91-287

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

CHESAPEAKE INSURANCE COMPANY, LIMITED,

Petitioner,

vs.

CONSTANCE B. FOSTER, Insurance Commissioner of the Commonwealth of Pennsylvania, as Rehabilitator of the Mutual Fire, Marine & Inland Insurance Company,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Did the United States Court of Appeals for the Third Circuit improperly extend this Court's ruling in *Carnegie-Mellon University v. Cohill*, 484 U.S. 343, 108 S. Ct. 614 (1988) ("*Cohill*") by permitting the district court to remand a diversity action to state court based on grounds concededly not authorized by Congress or this Court, to wit, a contractual "service of suit" provision?

Did the Third Circuit err in empowering the District Court to remand this properly removed diversity action to state court where Respondent violated the mandatory thirty (30) day time limit imposed by 28 U.S.C. § 1447(c) for non-jurisdictional remand motions and where the United State Court of Appeals for the Fifth Circuit has twice ruled to the contrary?

Did the Third Circuit err in holding that a contractual provision waived Petitioner's statutory right of removal where the provision contains no reference to removal or waiver, no statement restricting litigation to state court and no specific venue in which the parties agree to litigate, and where the Fifth and Eight Circuits have reached conflicting results?

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DECISIONS BELOW

The judgment of the United States Court of Appeals for the Third Circuit, filed May 20, 1991, is reported at 933 F.2d 1207 and is set forth in the Appendix hereto ("App.") at App. 1-27. The opinion of the United States District Court for the Eastern District of Pennsylvania, issued from the bench on September 26, 1990, is set forth at App. 28-41.

JURISDICTION

The judgment appealed from herein was entered by the United States Court of Appeals for the Third Circuit on May 20, 1991. Pursuant to 28 U.S.C. § 1254(1), this Court has jurisdiction to review the judgment by writ of certiorari. Appellate jurisdiction is appropriate because the appeal is from an order which is collaterally final and which amounted to a dismissal since its effect was to terminate federal court jurisdiction. *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 69 S.Ct. 1221 (1949); *Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.*, 460 U.S. 1, 103 S.Ct. 927 (1983); *see* App. 5-8. Appellate review is not precluded by 28 U.S.C. § 1447(d) because the district court exceed its statutory authority in remanding the matter to state court (1) after the thirty day time limit imposed by 28 U.S.C. § 1447(c) had expired and/or (2) for a reason not permitted by 28 U.S.C. § 1447(c). *E.g.*, *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336, 96 S.Ct. 584 (1976); *In re Shell Oil Company*, 932 F.2d 1518, 1520-21 (5th Cir. 1991); *Air-Shields, Inc. v. Hon. John P. Fullam*, 891 F.2d 63, 65 (3d Cir. 1989).

STATUTES INVOLVED IN THE CASE

The statute primarily involved herein is 28 U.S.C. § 1447(c) ("Section 1447(c)"), which provides as follows:

> A motion to remand the case on the basis of any defect in removal procedure must be made within thirty days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it

> appears that the district court lacks subject matter jurisdiction, the case shall be remanded. An order remanding the case may require payment of just costs and any actual expenses, including attorneys fees, incurred as a result of the removal. A certified copy of the order of remand shall be mailed by the clerk to the clerk of the State court. The State court may thereupon proceed with such case.

To Petitioner's knowledge, there are no constitutional provisions, treaties, ordinances or regulations involved in this case.

STATEMENT OF THE CASE

Preliminary Statement

This case raises important issues as to the powers of the federal courts concerning (1) a district court's authority to remand to state court a properly-removed diversity action on the basis of a "Service of Suit" or forum selection provision, (2) the scope of Congress' recently-enacted time limits governing remand motions and (3) the correct construction of a contractual provision alleged to constitute a waiver of Petitioner's right to removal and the proper standard for ascertaining such waiver.

The Third Circuit held that the district court could properly remand this action even though Respondent failed to move for remand within the thirty day (30) limit mandated by Section 1447(c) for all remand motions not founded on a lack of subject matter jurisdiction. Specifically, the Third Circuit ruled that Section 1447(c) did not apply to remand motions based on a forum selection provision and, further, that the district courts are empowered to grant remand motions based on such grounds despite the lack of any further statutory authorization therefor.

The Third Circuit also held that a provision in the underlying contracts at issue entitled "Service of Suit", which said nothing about removal rights or waiver, in fact, constituted a waiver of Petitioner's statutory rights to removal.

Review by this Court pursuant to a writ of certiorari is warranted because the Third Circuit decided several important questions of federal law which have not been, but should be, settled by this Court. *See* Rules of the Supreme Court of the United States ("Sup.Ct.R.") 10.1.(c). Moreover, review by this Court is warranted because:

(1) The Third Circuit's holding that the district court had inherent remand powers authorizing it to remand the within action conflicts with this Court's decisions in *Cohill* and *Thermtron*;

(2) The Third Circuit's ruling that Section 1447(c) was inapplicable to the remand proceedings herein conflicts with the decisions of the United States Court of Appeals for the Fifth Circuit in *Baris v. Sulpicio Lines, Inc.*, 932 F.2d 1540 (1991) and *In re Shell Oil Company*, 932 F.2d 1518; and

(3) The Third Circuit's construction of the contractual provision at issue directly conflicts with the decision of the United States Court of Appeal for the Sixth Circuit in *In Re Delta America Re Insurance Co.*, 900 F.2d 890 (1990), which construed the *identical* clause as *not* constituting a waiver of removal rights.

See Sup.Ct.R. 10.1.(a), (c).

Statement of Facts

Petitioner Chesapeake Insurance Company Limited ("Petitioner" or "Chesapeake") is a Bermuda corporation with its principal place of business at Hamilton, Bermuda.[1]

[1] Chesapeake's parent company is CFC Holdings Corporation; Chesapeake has no subsidiaries. *See* Sup.Ct.R. 29.1

Respondent Constance B. Foster is the Insurance Commissioner of Pennsylvania acting in her capacity as the Rehabilitator of Mutual Fire, Marine & Inland Insurance Company ("Mutual Fire"). Mutual Fire is a Pennsylvania corporation and has been subject to rehabilitation proceedings under the control of Respondent's office since December 8, 1986.

This action was commenced by Respondent in the Commonwealth Court of Pennsylvania on or about September 29, 1989. On October 19, 1989, pursuant to 28 U.S.C. §§ 1332(a), 1441(a) and 1446, Petitioner properly removed this case to the United States District Court for the Eastern District of Pennsylvania based on the court's diversity jurisdiction.

Respondent's complaint asserts claims for the alleged breach of certain reinsurance agreements purportedly in effect between July 1, 1982 and June 30, 1985. Petitioner has since answered the complaint, wherein it has denied liability, asserted numerous affirmative defenses and alleged three counterclaims for rescission.

Fifty-four (54) days after Petitioner's removal, on December 11, 1989, Respondent moved the district court to remand the action to the Commonwealth Court of Pennsylvania, claiming that (1) the district court should abstain from adjudicating the matter and (2) Chesapeake purportedly had waived its right to remove based on a certain contractual provision. App. 9. In support of the assertion that Petitioner contractually had waived its removal rights, Respondent relied on the following provision contained in the agreements at issue:

> SERVICE OF SUIT
>
> In the event the Retrocessionaire is not domiciled in the United States of America, and the Retrocessionaire fails to pay any amount claimed to be due hereunder, the Retrocessionaire, at the request of the Company, will submit to the jurisdiction of any court of competent jurisdiction within the United States and will comply with all requirements necessary to give such

> court jurisdiction; and all matters arising hereunder shall be determined in accordance with the law and practice of such court.

See App. 20.

Petitioner opposed remand to state court. As a foreign corporation being sued by the Commonwealth of Pennsylvania in a Pennsylvania state court, Petitioner rightfully and reasonably preferred to have the matter adjudicated by the presumptively more independent federal district court. Since the Chesapeake-Mutual Fire agreements said absolutely nothing about Chesapeake waiving its removal rights and contained no provision confining litigation to Pennsylvania state court or even to a state court generally, Petitioner denied that it ever agreed to waive any of its removal rights.[2]

Moreover, in opposing remand Petitioner asserted that, irrespective of whether there had been a valid waiver of removal, pursuant to Section 1447(c) the district court lacked authority to remand the action because Respondent's motion (1) was in violation of the mandatory thirty day time limit for non-jurisdictional remand motions and/or (2) was seeking remand on grounds not recognized as valid.

The district court, on September 26, 1990, granted Respondent's motion to remand in an opinion delivered from the bench. App. 28-41. The district court did not reach Respondent's claims regarding abstention, but instead, ruled that the "Service of Suit" clause constituted a waiver of Petitioner's removal rights. Thereafter, the district court entered an order remanding the action to state court but upon Petitioner's motion, stayed its judgment pending appeal. App. 5.

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[2] During oral argument before the district court, Respondent's counsel conceded that "nothing in the text . . . specifically eliminates Chesapeake's right to removal" and that the subject clause "was not a model of clarity".

The Third Circuit, in an opinion and judgment filed on May 20, 1991, affirmed the district court. After concluding that the Court had appellate jurisdiction, the Third Circuit made three rulings challenged herein: that Respondent's remand motion was timely, that the district court had authority to remand on the basis of the "Service of Suit" clause and that such clause did in fact operate as a waiver of Petitioner's removal rights. App. 9-25.

On June 7, 1991, Petitioner moved for a stay of the mandate of the Third Circuit; on June 28, 1991, the Court denied Chesapeake's motion.

ARGUMENT

I. A WRIT OF CERTIORARI SHOULD ISSUE BECAUSE THE JUDGMENT BELOW CONFLICTS WITH DECISIONS OF THIS COURT AND OF OTHER CIRCUITS AND BECAUSE IT DECIDED IMPORTANT QUESTIONS OF FEDERAL LAW WHICH SHOULD BE SETTLED BY THIS COURT

A. *The Third Circuit Improperly Expanded The Power Of The District Courts and This Court's Ruling in Cohill*

The exclusive grounds governing the remand of a diversity action removed pursuant to 28 U.S.C. §§ 1441(a) and 1446 are set forth in Section 1447(c). *Thermtron*, 423 U.S. at 342, 96 S.Ct. at 588-89 (case removed under 28 U.S.C. §§ 1441(a) and 1446 "may be remanded only in accordance with [28 U.S.C.] § 1447 which governs procedure after removal"); *Cohill*, 484 U.S. at 358, 108 S.Ct. at 623 (White, J., joined by Rehnquist, C.J. and Scalia, J., dissenting) ("cases may be remanded only for reasons authorized by statute"). There has never been recognized a common law of remand. *Cohill*, 484 U.S. at 360, 108 S.Ct. at 623-24 (dissenting opinion).

The Third Circuit, in sustaining the district court's remand order, held that a remand motion premised on a forum selection

clause is *not* governed by Section 1447(c) and the thirty (30) day remand time limit set forth therein. App. 9-13. As discussed below, Petitioner believes that the Court below erred and that Respondent's remand motion *was* both authorized by and subject to Section 1447(c).

However, the Third Circuit then held that, despite the absence of a statutory basis, a forum selection clause is a "proper, *non-statutory* ground for remand". App. 14 (emphasis supplied). Such a ruling clearly conflicts with this Court's decisions in *Cohill* and *Thermtron*, and improperly expands the powers of the district courts beyond those granted by Congress.

Thermtron was a case arising out of an automobile accident; the action was removed to federal court on the basis of diversity, and then remanded. 423 U.S. at 337-41, 96 S.Ct at 586-88. This Court ruled that a case removed under 28 U.S.C. §§ 1441 and 1446 "may be remanded only in accordance with § 1447 which governs procedure after removal" and vacated the district court's remand order. *Id.* at 342-45. Thus, this Court stated that it was:

> not convinced that Congress ever intended to extend carte blanche authority to the district courts to revise the federal statutes governing removal by remanding cases on grounds that seem justifiable to them but which are not recognized by the controlling statute. . . . Because the District Judge remanded a properly removed case on grounds that he had no authority to consider, he exceeded his statutorily defined power. . . .

Id. at 351, 96 S.Ct. at 593.

Cohill, unlike *Thermtron*, was an action between *non-diverse* parties that involved both state and federal claims and was removed to federal court on the basis of pendent jurisdiction. 484 U.S. at 345, 108 S.Ct. at 616. A divided Court (5-3) held that under these circumstances, after the federal claim(s) creating federal subject matter jurisdiction have been dismissed, the doctrine of pendent jurisdiction includes the authority to

remand to state court the remaining state law claims. *Id.* at 348-356, 108 S.Ct. at 618-22.[3]

The majority reasoned that the doctrine of pendent jurisdiction (unlike diversity) creates an area of discretionary subject matter jurisdiction and that when pendent jurisdiction is invoked, the district court must "consider throughout the litigation whether to exercise its jurisdiction over the case". *Id.* at 349-50, 108 S.Ct. at 618-19. Therefore, the majority concluded that the discretion inhering in the doctrine of pendent jurisdiction, to deny jurisdiction at the outset or at any time thereafter, also encompasses the authority to remand. *Id.*[4]

Cohill did not, however, overrule or limit the *Thermtron* holding respecting diversity cases in any way. To the contrary, the *Cohill* majority made clear that the remand authority it had found strictly was limited to the facts before it, i.e., to cases removed on the basis of pendent jurisdiction. Thus, it stated:

> The remand power that we recognize today *derives from the doctrine of pendent jurisdiction* and *applies only to cases involving pendent claims*. Sections 1441(c) and 1447(c)...do not apply to cases over which a federal court has pendent jurisdiction.

Id. at 355 n.11, 108 S.Ct at 621 n.11 (emphasis supplied).

Moreover, with respect to cases removed from state court on the basis of diversity and the Court's holding in *Thermtron* that the non-statutory remand of such cases is unlawful, the Court stated:

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[3] The *Cohill* majority was comprised of Justices Marshall, Brennan, Blackmun, Stevens and O'Connor; Chief Justice Rehnquist and Justices White and Scalia dissented.

[4] The dissenting Chief Justice and Associate Justices flatly rejected the suggestion that the district courts possess inherent, extra-statutory remand authority, finding it "inconsistent with Congress' understanding of the federal courts' remand authority as well as with the precedents of this Court". 484 U.S. at 359, 108 S.Ct. at 623.

> The *Thermtron* decision was a response to a clearly impermissible remand, of a kind very different from that at issue here. In *Thermtron*, the District Court had no authority to decline to hear the removed case. The Court had diversity jurisdiction over the case, which is not discretionary.

Id. at 356, 108 S.Ct. at 621-22. Hence, with respect to diversity cases, the *Cohill* decision expressly left *Thermtron* intact and was limited only to cases removed on the basis of pendent jurisdiction. *See Hughes v. Ohio Bell Telephone Company*, 916 F.2d 367, 372 (6th Cir. 1990).

Here, notwithstanding *Thermtron* and this Court's explicit admonitions in *Cohill*, the Third Circuit expanded the *Cohill* ruling – and the remand power of the district courts – to encompass the remand of a *diversity* action on the basis of an alleged "Service of Suit" or forum selection clause. The Third Circuit did acknowledge that "a reasonable argument for the opposing view exists" and that "*Cohill* and *Thermtron* taken together could stand for the proposition that non-statutory remands are only authorized when the district court has discretion not to exercise pendent jurisdiction over the case". App. 14. Nonetheless, the Third Circuit deigned to extend *Cohill* to diversity cases, reasoning that permitting remand in such situations would promote economy, convenience and fairness. App. 19.

A writ of certiorari to review the judgment below is warranted. The Third Circuit's ruling clearly is contradictory to this Court's decisions in *Thermtron* and *Cohill*. Moreover, the Third Circuit's reasoning effects a drastic expansion of the federal courts' power to dispose of cases within their mandatory jurisdiction, so long as economy, convenience and fairness is promoted. Such an expansion, as explained by the *Cohill* dissenters, is contrary to Congress' control of the district courts as well as its clear understanding of remand as exclusively statute-based.[5] The

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[5] Indeed, in the past four years alone Congress has twice enacted legislation dealing with questions of remand. *See* 1988 Judicial Improvements and Access

(Footnote continued)

propriety of remand under these circumstances and the basis therefor thus present important questions of federal law which should be decided by this Court.

B. *The Third Circuit's Construction of Section 1447(c) Conflicts With Decisions of the Fifth Circuit and Those of this Court Respecting The Proper Use of Legislative History*

Petitioner asserts that Respondent's remand motion was authorized by statute - by Section 1447(c) - but therefore was subject to the thirty (30) day statutory time limit and, accordingly, was barred since it was made fifty four (54) days after removal. App. 9. The Third Circuit rejected Petitioner's argument, holding that Section 1447(c) does not encompass remand motions based on an alleged contractual waiver of removal. In so ruling, the Third Circuit reached a result at odds with rulings of the Fifth Circuit; further, the Third Circuit misapplied this Court's decisions and incorrectly refused to heed highly relevant Congressional history. As a result, the Third Circuit misconstrued the statute.

Prior to 1988, Section 1447(c) contained no time limit for remand motions. Instead, in pertinent part, it stated as follows:

> If at any time before final judgment it appears that the case was removed improvidently and without jurisdiction, the district court shall remand the case, and may order the payment of just costs.

See Cohill, 484 U.S. at 347 n.2, 108 S.Ct. at 617 n.2.

In 1988, Congress substantially revised several provisions of the removal and remand statutes (28 U.S.C. §§ 1441-1452), including Section 1447(c). Pub.L. 100-702, 102 Stat 4642 (1988); *see generally*, *Air-Shields*, 891 F.2d at 65. As amended, Section

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to Justice Act, Pub.L. 100-702, 102 Stat. 4642 (amending, *inter alia*, § 1447(c)); Judicial Improvements Act of 1990, Pub.L. 101-650, 104 Stat. 5089 (amending § 1441(c)). Congress' activity in the field surely demonstrates its understanding that remand powers flow strictly from statute.

1447(c) deletes "improvidently and without jurisdiction" as the test for remand and enacts the following two categories of remand authority: any defect in removal procedure and a lack of subject matter jurisdiction. Remand motions asserting the former must be made within thirty (30) days of removal, while those based on the latter may be made at any time before final judgment. *See supra* at 1-2; *see generally* 1A J. Moore & B. Ringle, *Moore's Federal Practice* ¶¶ 0.157 [11.3-11.5] at 171-80, 0.168[4.1] at 642-44 (2d ed. 1990).

Thus, any non-jurisdictional remand motion now must be made within thirty (30) days of removal. In imposing such time limit, Congress explained its intent and purpose as follows:

> Section 1447(c) now appears to require remand to state court if at any time before final judgment it appears that the removal was improvident. So long as the defect in removal procedure does not involve a lack of federal subject matter jurisdiction, there is no reason why either State or Federal Courts, or the parties, should be subject to the burdens of shuttling a case between two courts that each have subject matter jurisdiction. There is also some risk that a party who is aware of a defect in removal procedure may hold the defect in reserve as a means of forum shopping if the litigation should take an unfavorable turn. ***The amendment provides a period of 30 days within which remand must be sought on any ground other than lack of subject matter jurisdiction.*** The amendment is written in terms of a defect in "removal procedure" in order to avoid any implication that remand is unavailable after disposition of all federal questions leaves only State law questions . . . .

H.R. 100-889 at 72, 100 Code Cong. & Adm. News at 6033 (emphasis supplied). Since Respondent's remand motion was not based on any allegation that subject matter jurisdiction was

lacking, it was subject to, and precluded by, Section 1447(c)'s thirty (30) day time limit.[6]

Here, however, the Third Circuit refused to apply Section 1447(c)'s time limit to Respondent's remand motion, notwithstanding Congress' clear directive that the time limit govern remand motions based on *any ground* other than lack of subject matter jurisdiction. Instead, the Third Circuit held that the "defect in removal procedure" category excluded remand motions based on a forum selection clause. App. 13.

The Third Circuit's ruling is at odds with two decisions of the Fifth Circuit issued just subsequent to the ruling below. In *Shell Oil*, the Fifth Circuit reviewed on mandamus an order remanding the action to state court; remand had been ordered on the ground that removal was in violation of 28 U.S.C. § 1441(b) since two defendants were citizens of the forum state. 932 F.2d at 1518. Despite the fact that Section 1441(b) imposes a clearly substantive restriction on removal, defendants argued that plaintiffs were barred by Section 1447(c) from seeking remand because their remand motion was made thirty two (32) days after removal. The Fifth Circuit thus framed the issue as "whether the presence of forum defendants is a 'defect in removal procedure' such that § 1447(c)'s time limit is applicable". *Id.* at 1521.

After a thorough analysis of the legislative history, commentators and precedents, the Fifth Circuit held that the "defect in removal procedure" provision and its accompanying thirty (30) day time limit govern "*all non-jurisdictional defects existing at the time of removal*". *Id.* at 1522 (emphasis added). Hence, the Fifth Circuit ruled that plaintiffs had lost the opportunity to seek remand and vacated the remand order. *Id.* at 1523.

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[6] The lower federal courts have applied Section 1447(c)'s time limit to a wide range of cases and barred concededly meritorious remand motions where such time limit was violated. *See Air-Shields*, 891 F.2d at 65-66; *Shell Oil*, 932 F.2d at 1521-23; *Cook v. Shell Chem. Co.*, 730 F. Supp. 1381 (M.D.La. 1990); *Leidolf v. Eli Lilly and Co.*, 728 F. Supp. 1383, 1387-88 (E.D.Wis. 1990); *Winners Corporation v. Lafeyette Life Insurance Company*, 734 F. Supp. 812, 814-15 (M.D. Tenn. 1989); *Gray v. Moore's Business Forms, Inc.*, 711 F. Supp. 543 (N.D.Cal. 1989); *Taylor v. St. Louis Southwestern Railway Co.*, 128 F.R.D. 118 (D.Kansas 1989).

Three weeks later, a different panel of the Fifth Circuit held the thirty (30) day bar of Section 1447(c) applicable to an even more "substantive" removal defect in *Baris*, 932 F.2d 1540. There, defendants removed to federal court an admiralty action on the basis of federal question jurisdiction; fifty-four (54) days later plaintiffs, *inter alia*, sought remand on the ground that an action commenced in state court pursuant to the "savings to suitors" clause of 28 U.S.C. § 1333(1) is not removable in the absence of diversity. 932 F.2d at 1542-53.

Although the Fifth Circuit recognized that the action likely was, as a matter of substantive admiralty law, non-removable, it held that plaintiffs had lost the opportunity to seek remand by failing to comply with Section 1447(c)'s thirty (30) day time limit. The *Baris* plaintiffs argued that the time limit applied only to a "defect in removal procedure", which they had not asserted. *Id.* at 1543. The Fifth Circuit disagreed, holding that, as used in Section 1447(c), "a 'procedural' defect is any defect that does not go to the question of whether the case originally could have been brought in federal district court". *Id.* at 1544. *Compare Cook*, 730 F. Supp. at 1381-82 (removal on basis of diversity in violation of bar of 28 U.S.C. § 1445(c) held "defect in removal procedure"; remand waived by non-compliance with thirty day time limit). The Fifth Circuit reasoned that removal in derogation of a substantive restriction on removal jurisdiction (i.e., a forum selection clause), as well as in violation of a particular removal procedure, each constitutes a defect in "removal process" and is thus governed by Section 1447(c). Id. at 1544-46.[7]

There is thus a clear split between the Third Circuit and the Fifth Circuit as to the meaning and application of Section 1447(c). The Third Circuit held below that Section 1447(c) was inapplicable and that remand was timely. Under the Fifth Circuit holdings, however, however, remand of the instant matter beyond the thirty (30) day time limit clearly would have been

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[7] In both *Shell Oil* and *Baris*, the Fifth Circuit found the leading commentators to be in accord with its approach. *Shell Oil*, 932 F.2d at 1521-22; *Baris*, 932 F.2d at 1544-45.

precluded since the "Service of Suit" clause allegedly constituting a waiver of Petitioner's removal rights (1) was available to Respondent as a basis for remand at the time of removal and (2) had no effect on the district court's original subject matter jurisdiction to hear this action.

Apart from inter-Circuit conflicts, there are additional reasons supporting review by this Court. Indeed, the application and scope of Section 1447(c) is an important question of federal law that should be decided by this Court.[8] As the foregoing discussion of the Circuit Courts' conflicting approaches demonstrates, the need for uniform guidance by the Supreme Court becomes clear when one examines the various recognized grounds for remand.

Certain potential grounds for remand clearly are "procedural", such as where the removing party fails to file a "short and plain statement of the grounds for removal, together with a copy of all process, pleadings and orders" in violation of 28 U.S.C. § 1446(a).

Other grounds for remand, however, are less "procedural". For example, removal is not available in a diversity case if any defendant is a citizen of the state where the action is commenced. *See* 28 U.S.C. § 1441(b). Nor may a diversity case be removed more than one year after its commencement. *See* 28 U.S.C. § 1446(b). Finally, the removal statutes preclude the removal of actions based on state workmen's compensation statutes. *See* 28 U.S.C. § 1445(c). Nonetheless, remand motions asserting these grounds properly have been held within the "defect in removal procedure" category and barred where the thirty (30) day limit was violated. *E.g.*, *In re Shell Oil*, 932 F.2d at 1521-23; *Gray*, 711 F. Supp. at 545; *Cook*, 730 F. Supp. at 1382; *Taylor*, 128 F.R.D. at 119-20. The Third Circuit's ruling below erroneously suggests that remand motions such as these are not subject to the statutory thirty (30) day time limit.

The Third Circuit here took note of the highly significant legislative history, but ruled that the statutory language of

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[8] Congress' passage of the 1988 amendments to the Section 1447(c) suggests at the least that the Legislative branch views the matter as significant.

Section 1447(c) "is clear on its face", and therefore refused to heed the clear directive the statutes legislative history. App. 10-13. However, the phrase at issue, "defect in removal procedure", neither is defined nor self-defining. Indeed, despite proclaiming the statute to be clear on its face, the Third Circuit could provide no definition or explanation of the parameters of Section 1447(c)'s time limit and "defect in removal procedure" language.

Without reference to Section 1447(c)'s legislative history, application of the subject statutory phrase is elusive, if not impossible. Since the meaning and scope of Section 1447(c) is not clear on its face, the Third Circuit's refusal to construe the statute in light of the legislative history underlying Section 1447(c)'s thirty (30) day time limit conflicts with this Court's rulings. *E.g.*, *Adams Fruit Co., Inc. v. Barrett*, __ U.S. __, __, 110 S.Ct. 1384, 1387 (1990) (where statutory language is not clear, construction turns on "intent of Congress as revealed in the history and purposes of the statutory scheme"); *Blum v. Stenson*, 465 U.S. 886, 896, 104 S.Ct. 1541, 1548 (1984) (same).

Moreover, even if the statutory phrase "defect in removal procedure" is clear and unambiguous, the result reached by the Third Circuit is "demonstrably at odds with the intentions of its drafters", and thus, incorrect. *E.g.*, *Demarest v. Manspeaker*, __ U.S. __, __, 111 S.Ct. 599, 604 (1991). Congress' statement that, within thirty days, "remand must be sought on *any ground* other than lack of subject matter jurisdiction", clearly cannot be squared with the Third Circuit's judgment that the remand motion at issue herein somehow was exempt.

The Third Circuit and the Fifth Circuit have thus rendered wholly contradictory rulings. Further, because the scope of Section 1447(c)'s time limit is an important issue of federal law that should be decided by this Court, and because the Third Circuit's refusal to give due weight to the pertinent legislative history conflicts with this Court's rulings, a writ of certiorari to review the judgment below is appropriate.

C. *The Third Circuit's Construction of the "Service of Suit" Clause was Erroneous and in Direct Conflict With The Sixth Circuit*

After holding that Respondent's remand motion was not governed by Section 1447(c) but nonetheless was timely and within the district court's powers, the Third Circuit ruled that the "Service of Suit" clause, *supra* at 4-5, constituted a waiver of Petitioner's removal rights. App. 20-26. Because the clause does not clearly and unequivocally demonstrate to a foreign defendant that it is waiving its right to remove to federal court state court suits against it, Petitioner respectfully submits that the Third Circuit erred in finding waiver. As noted earlier, the clause says nothing about removal, nothing about waiver, and nothing restricting litigation to Pennsylvania state courts or even a state court generally.

A writ of certiorari is warranted because the ruling below squarely conflicts with the ruling of the Sixth Circuit in *Delta America*, 900 F.2d 890. There, the Sixth Circuit had before it the *same* clause at issue here, which the district court had held to waive removal. *See id.* at 892; App. 22 n.15 (acknowledging that clause at issue in *Delta America* is "virtually the same"). In conflict with the judgment below, the Sixth Circuit in *Delta America* reversed the district court's remand order and held that the clause did *not* constitute a waiver of removal because it was not "explicit". *Id.* at 894.

Significantly, the *Delta America* Court held that the appropriate standard by which to assess the alleged waiver was whether it was "clear and unequivocal". *Id.* at 892 (citing *Regis Associates v. Rank Hotels*, 894 F.2d 193, 915 (6th Cir. 1990)). Employing "principles of contract interpretation", the Sixth Circuit reasoned that it would have been "easy enough" to explicitly provide for the waiver of removal rights in the agreement had that been the parties' intent. *Id.* at 892-94.

Similarly, in *Weltman v. Silna*, the Eighth Circuit examined a contract clause consenting to jurisdiction and venue "in state court in the City of St. Louis". 879 F.2d 425, 427 (1989). The

Eight Circuit held that the clause did not waive removal because waiver "must be clear and unequivocal" and the clause "did not address removal". *Id.* Here, however, the Third Circuit rejected the "clear and unequivocal" standard, and held, in effect, that the clause adequately implied a waiver of removal. App. 20-25 & n.15.[9]

Hence, because there are conflicts in various Courts of Appeals respecting (1) the correct standard to assess an alleged waiver of removal rights and (2) the proper construction of the clause at issue here, this Court should review the judgment below. Further, because the use of forum selection clauses is widespread, the contractual waiver of removal rights raises important issues of federal law that should be settled by this Court.

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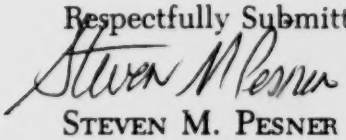
[9] The Third Circuit sought to distinguish *Delta America* on the basis that the removing defendant technically was a foreign sovereign that had effected removal pursuant to 28 U.S.C. § 1441(d). App. 22-23 n.15. This purported distinction is of little importance. As noted, the *Delta America* decision employed principles of contract construction, and acknowledged that a foreign sovereign, like any other litigant, can contractually waive removal so long as appropriate language is used. 900 F.2d at 893-94. Further, in *Delta America* the removing defendant made no claim to immunity; rather, the Court viewed the primary significance of the sovereign's removal rights as enabling "foreign states . . . to avoid any local bias or prejudices possibly inherent in state court proceedings". Id. at 893. This, of course, is no different from the purposes underlying Congress' establishment of removal jurisdiction for diverse defendants such as Petitioner.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court issue a writ of certiorari to review the judgment of the Third Circuit.

Dated: New York, New York
August 15, 1991

Respectfully Submitted,



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APPENDIX

Filed May 20, 1991

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 90-1752

CONSTANCE B. FOSTER, Insurance Commissioner of the Commonwealth of Pennsylvania, as Rehabilitator of the Mutual Fire, Marine & Inland Insurance Company,

v.

CHESAPEAKE INSURANCE COMPANY, LTD.,

Appellant.

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civ. No. 89-7468)

Argued April 15, 1991

BEFORE: STAPLETON, GREENBERG, and HIGGINBOTHAM, *Circuit Judges*

(Filed: May 20 , 1991)

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OPINION OF THE COURT

GREENBERG, *Circuit Judge*.

The appeal in this diversity of citizenship, breach of contract case, primarily involves the interplay between a contract's forum selection clause and 28 U.S.C. § 1447(c) governing remand upon removal.[1] The district court determined that: (1) a motion to remand based on a such a clause is not governed by the 30-day time limit imposed on motions for remand by section 1447(c); (2) such a clause is a permissible ground for remand; (3) the clause in this case waived the right of removal;

1. Provision for remand is also made in 28 U.S.C. § 1441(c) in circumstances not applicable here. A forum selection clause is also called a "service of suit" clause but as a matter of convenience we will use the first designation.

and (4) the clause is enforceable. The district court therefore remanded the case to the state court in which it had been commenced. We determine that we have jurisdiction over this appeal, and that the district court's several rulings were correct.

I.

FACTS AND PROCEDURAL HISTORY

In July 1982, Mutual Fire, Marine and Inland Insurance Company, a company organized and licensed under the laws of Pennsylvania, entered into a reinsurance agreement with defendant-appellant Chesapeake Insurance Company, Ltd., a Bermuda-based corporation. The agreement – or "treaty" – provided that Mutual Fire would "cede" to Chesapeake, and others, a portion of the risk that it, Mutual Fire, bore on its policies; Chesapeake would bear the cost of that risk once it became an actual liability; and for this Mutual Fire would pay premiums to Chesapeake. Mutual Fire entered into so many similar treaties that by the mid-1980's between 60% and 70% of its business entailed reinsurance, involving over 8,000 treaties with various insurers worldwide. The agreement between Mutual Fire and Chesapeake included the forum selection clause in issue here which required Chesapeake at Mutual Fire's request in the event of certain disputes to "submit to the jurisdiction of any court of competent jurisdiction within the United States."[2]

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2. Actually there were several treaties between Mutual Fire and Chesapeake but as the parties do not distinguish among them for purposes of the forum selection clause we refer to them in the singular.

These reinsurance treaties were apparently disadvantagous to Mutual Fire as it became insolvent, partly, it is alleged, due to the refusal of reinsurers like Chesapeake to pay their share of losses to Mutual Fire.[3] Accordingly, the Pennsylvania Insurance Commissioner (now plaintiff-appellee Constance B. Foster) took over Mutual Fire, and, on December 8, 1986, the Commonwealth Court of Pennsylvania appointed the commissioner Rehabilitator. Because one of Foster's duties as Rehabilitator is to marshal Mutual Fire's assets, she commenced this suit against Chesapeake in the Commonwealth Court seeking the monies allegedly owed by it to Mutual Fire under the agreement. Chesapeake is said to be in breach of its agreement with Mutual Fire in an amount in excess of $4,000,000.

On October 18, 1989, there being diversity of citizenship and an adequate amount in controversy to support district court jurisidiction, Chesapeake – in a manner which was timely and without procedural defect – removed this suit to the United States District Court for the Eastern District of Pennsylvania, but on December 11, 1989 – the 54th day after the notice of removal was filed –, Foster moved to remand the case to the Commonwealth Court.

The district court granted the motion in an oral opinion, first holding that section 1447(c) did not bar the motion as untimely. That section provides, in part:

> A motion to remand the case on the basis of any defect in removal procedure must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time

3. At year-end 1988, Mutual Fire's deficit was over $400,000,000, constituting the country's third or fourth largest insurer insolvency.

> before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded.

Then holding that the grounds for remand specified by section 1447(c) were not exclusive, and that waiver of the right to remove constituted a proper ground for remand, the court found that Chesapeake had waived its right to remove pursuant to the forum selection clause in its agreement with Mutual Fire. Finally, holding that the clause was enforceable, the district court ordered the case remanded by order of September 27, 1990. This appeal followed and the district court has stayed its order of remand pending appeal.

II.

DISCUSSION

A. *Appellate Jurisdiction*

Although the parties in their original briefs contended that this court has jurisdiction over the appeal from the district court's order of remand under 28 U.S.C. § 1291, we *sua sponte* ordered supplemental briefing on this issue in light of 28 U.S.C. § 1447(d), which provides, in part: "An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise . . . ."[4] Having reviewed the supplemental submissions and the authority cited

4. An exception is made for civil rights cases remanded to the state court. 28 U.S.C. § 1447(d). Additionally, the Financial Institutions Reform, Recovery and Enforcement Act ("FIRREA") empowers the Resolution Trust Corporation to remove actions to federal court and also gives it the right to appeal any remand orders issued by a district court. *See* 12 U.S.C. § 1441a(l)(3).

therein, we determine that we have jurisdiction over this appeal.

The Supreme Court in *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336, 96 S.Ct. 584 (1976), held that an order remanding a case for reasons *not* mentioned in the statute governing removal upon remand, 28 U.S.C. § 1447(c), *is* reviewable. In *Thermtron*, the district court remanded a properly removed diversity case because of the crowded state of its docket, an action the court of appeals held on an application for a writ of mandamus or prohibition unreviewable because of section 1447(d). The Supreme Court, however, held that subsections (c) and (d) of section 1447 are *in pari materia* and must be read accordingly. "This means that only remand orders issued under § 1447(c) and invoking the grounds specified therein . . . are immune from review under § 1447(d)." 423 U.S. at 346, 96 S.Ct. at 590. Thus, whereas section 1447(c) then specified as grounds for remand that "the case was removed improvidently and without jurisdiction," and whereas the district court had remanded for a reason *not* mentioned by section 1447(c), the Court held that review of the order of remand was not barred by section 1447(d). The Court then reversed the judgment of the court of appeals, and remanded the case to that court for it to issue a writ of mandamus "to prevent nullification of the removal statutes by remand orders resting on grounds having no warrant in the law." 423 U.S. at 353, 96 S.Ct. at 594.

Accordingly, while section 1447(d) was intended "to prevent delay in the trial of remanded cases by protracted litigation of jurisdictional issues," 423 U.S. at 351, 96 S.Ct. at 593 – and the district court is therefore given the last word on whether it has jurisdiction to hear the case –,

that policy does not apply when the district court has reached beyond jurisdictional issues or issues of defective removal, and has remanded for other reasons. Accordingly, the order of remand here, based on the forum selection clause in the contract between Mutual Fire and Chesapeake, is not rendered unappealable by section 1447(d). In the words of another court of appeals that has considered this issue:

> [W]here a district court bypasses the jurisdictional arguments and reaches the merits of a contract dispute, the policy [behind section 1447(d)] is inapplicable. Any delay caused by an appeal of the contract issue is a delay that must be countenanced. To apply section 1447(d) to the district court's decision on the enforceability of the forum selection clause would extend the scope of section 1447(d) far beyond its intended parameters and would leave matters of substantive contract law unreviewable. We refuse to impute such an intent to Congress.

Pelleport Investors, Inc. v. Budco Quality Theatres, Inc., 741 F.2d 273, 277 (9th Cir. 1984).

In a similar vein, the Court of Appeals for the Sixth Circuit has stated, in a case also involving remand due to a forum selection clause: "[A] remand order is reviewable on appeal when it is based on a substantive decision on the merits of a collateral issue as opposed to just matters of jurisdiction." *Regis Associates v. Rank Hotels (Management) Ltd.*, 894 F.2d 193, 194 (6th Cir. 1990). *See also Clorox Co. v. United States District Court for the Northern District of California*, 779 F.2d 517, 520 (9th Cir. 1985) (same; reviewing on appeal remand due to claimed waiver of removal); *In re Delta America Re Ins. Co.*, 900 F.2d 890, 892

(6th Cir. 1990) (following *Regis*; reviewing on appeal remand due to forum selection clause after removal by retrocessionaire); *Karl Koch Erecting Co. v. New York Convention Center Dev. Corp.*, 838 F.2d 656, 658 (2d Cir. 1988) (same; reviewing on appeal remand due to forum selection clause).[5]

Furthermore, an order remanding a case pursuant to a forum selection clause is "final" for the purposes of 28 U.S.C. § 1291 under the collateral order doctrine as it conclusively determines a disputed issue wholly separate from the merits of the litigation, *i.e.*, the legal construction of the clause; it ends the litigation in the federal forum, amounting to a dismissal since its purpose and effect is to surrender jurisdiction to the state court; and if not appealable now the order will be unreviewable. *See Pelleport*, 741 F.2d at 278.

Accordingly, 28 U.S.C. § 1447(d) does not bar review of the order of the district court remanding this case to the Commonwealth Court, and that order is considered "final" so as to vest this court with jurisdiction to hear this appeal under 28 U.S.C. § 1291.[6]

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5. Cf. *Air-Shield, Inc. v. Fullam*, 891 F.2d 63, 66 (3d Cir. 1989) (more than 30 days after notice of removal filed, district court *sua sponte* remanded case due to procedural defects; as district court's order was therefore not based on section 1447(c), in the sense that it did not comply with the 30-day limitation period therein, this court's review on mandamus was not limited by section 1447(d)).

6. We note that because the order challenged is collaterally "final" as making a merits determination, an *appeal* is proper here, *not* a petition for mandamus. *See Corcoran v. Ardra Ins. Co.*, 842 F.2d 31, 35 (2d Cir. 1988); *Karl Koch Erecting Co. v. New York Convention Center Dev. Corp.*, 838 F.2d at 659 n.1; *Pelleport Investors, Inc. v. Budco Quality Theatres, Inc.*, 741 F.2d at 277-78. Of course, if we considered that

B. *The 30-day Time Limit of Section 1447(c)*

Foster's motion to remand – made on the 54th day after the notice of removal was filed – was predicated on two grounds: first, that the district court should abstain from hearing the case, and, second, Chesapeake had waived its right to remove by executing the agreement with the forum selection clause. The district court decided the matter solely on the basis of the clause. The parties agree that a stipulation into which they entered before the district court did not address the timeliness of Foster's motion as it merely gave Foster more time to move for remand due to defective removal. Chesapeake claims that the motion for remand was untimely under section 1447(c). That section, again, provides that a motion to remand the case "on the basis of any defect in removal procedure must be made within 30 days after the filing of the notice of removal," and that a motion to remand based on lack of subject matter jurisdiction may be made at any time before final judgment. 28 U.S.C. § 1447(c). Foster, however, claims that the 30-day limit of section 1447(c) is not applicable to her motion for the same reason that the stipulation is not

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mandamus was required, we could treat the notice of appeal as an application for the writ. We also point out that in *McLaughlin v. ARCO Polymers, Inc.*, 721 F.2d 426, 428 n.1 (3d Cir. 1983), we held, without reliance on the collateral order doctrine, that an order transferring an action commenced in a district court to a state court on the ground that the district court lacked subject matter jurisdiction was appealable as a final order. While, we recognize that an order remanding for lack of jurisdiction is subject to 28 U.S.C. § 1447(d), it is difficult in principle to distinguish between an order of remand and an order of transfer for purposes of finality as in both situations the order effectively terminates the case in the federal courts. *See Carteret Savings Bank, FA v. Shushan*, 919 F.2d 225, 229 n.7 (3d Cir. 1990).

applicable to her motion – *i.e.*, because the motion was not based on "any defect in removal procedure."[7]

Chesapeake's claim that the 30 day limit nonetheless applies to a motion not grounded on a defect in removal procedure is based on the legislative history of section 1447(c). Prior to the amendments made to section 1447 on November 19, 1988, by the Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, § 1016, 102 Stat. 4670 (1988), section 1447(c) read:

> If at any time before final judgment it appears that the case was removed improvidently and without jurisdiction, the district court shall remand the case, and may order the payment of just costs.

28 U.S.C. § 1447(c) (1982).

The Report of the House Judiciary Committee accompanying the 1988 Act had this to say about old section 1447(c) and the new section as amended:

> Section 1447(c) now appears to require remand to state court if at any time before final judgment it appears that the removal was improvident. So long as the defect in removal procedure does not involve a lack of federal subject matter jurisdiction, there is no reason why either State or Federal courts, or the

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7. A forum selection clause does not oust a court of subject matter jurisdiction, *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 12, 92 S.Ct. 1907, 1914 (1972), and abstention is, of course, predicated on the notion that while the federal court *has* subject jurisdiction, it should decline to *exercise* it. Accordingly, neither prong of Foster's motion raised the issue of lack of subject matter jurisdiction.

> parties, should be subject to the burdens of shuttling a case between the two courts that each have subject matter jurisdiction. There is also some risk that a party who is aware of a defect in removal procedure may hold the defect in reserve as a means of forum shopping if the litigation should take an unfavorable turn. *The amendment provides a period of 30 days within which remand must be sought on any ground other than lack of subject matter jurisdiction.* The amendment is written in terms of a defect in removal procedure' in order to avoid any implication that remand is unavailable after disposition of all federal questions leaves only State law questions that might be decided as a matter of ancillary or pendent jurisdiction or that instead might be remanded.

H.R. Rep. No. 889, 100th Cong., 2d Sess. 72, *reprinted in* 1988 U.S. Code Cong. & Admin. News 5982, 6033. (Emphasis added). Pointing to the above underscored language in the Report that states that "[t]he amendment provides a period of 30 days within which remand must be sought on *any* ground other than lack of subject matter jurisdiction," *id.* (emphasis added), Chesapeake asserts that all non-jurisdictional motions for remand – including those grounded upon a forum selection clause – must be made within the 30-day period.

We do not agree. As the district court noted, Chesapeake's theory is based on the erroneous principle that "if the statute is clear, one should appeal to the legislative history . . . ." Indeed, section 1447(c) could not be clearer, and to adopt Chesapeake's view by drawing upon legislative history without an ambiguity appearing in the statute would be contrary to the rules of statutory

construction. *See Rubin v. United States*, 449 U.S. 424, 430, 101 S.Ct. 698, 701 (1981) (when language of statute is clear "judicial inquiry is complete"); *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 109 S.Ct. 1026, 1031 (1989) (plain meaning of legislation is conclusive except in rare case where literal application of statute will produce result demonstrably at odds with intention of drafters); *Paskell v. Heckler*, 768 F.2d 540, 543 (3d Cir. 1985) (while relevant legislative history must be considered, "clear statutory language placed an extraordinarily heavy burden on the party who seeks to vary it by reference to legislative history").

Moreover, the House Report itself recognizes the existence of at least one ground for remand *not* mentioned in section 1447(c) and *not* governed by the 30-day requirement – *i.e.*, when "disposition of all federal questions leaves only State law questions that might be decided as a matter of ancillary or pendent jurisdiction or that instead might be remanded." H.R. Rep. No. 889, 100th Cong., 2d Sess. 72, *reprinted in* 1988 U.S. Code Cong. & Admin. News at 6033. This ground for remand was recognized by the Supreme Court in *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 108 S.Ct. 614 (1988), and has, in turn, been used by at least one court of appeals for the proposition that there are other non-section 1447(c) reasons for remand, *see Corcoran v. Arda Ins. Co.*, 842 F.2d, 31, 33-34 (2d Cir. 1988) (abstention was legitimate, non-section 1447(c) ground for remand; citing and discussing *Cohill*). The very legislative history upon which Chesapeake relies, then, recognizes that not all non-jurisdictional motions for remand are governed by the 30-day time limit section 1447(c).

Accordingly, as the statute is clear on its face and the legislative history ambiguous at best, the district court was correct in holding that section 1447(c)'s requirement that "[a] motion to remand the case *on the basis of any defect in removal procedure* must be made within 30 days after the filing of the notice of removal" applies *only* to motions for remand *on the basis of any defect in removal procedure*. *See* 28 U.S.C. § 1447(c). *Cf. Air-Shields, Inc. v. Fullam*, 891 F.2d 63, 65 (3d Cir. 1989) ("[t]he 1988 version of Section 1447(c) omits the previous 'improvidently removed' grounds for removal and restricts the time for remand motions based on procedural defects"); *State v. Ivory*, 906 F.2d 999, 100 n.1 (4th Cir. 1990) ("The thirty-day limitation applies only to objections to defects in removal procedure").[8]

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8. It is true that Chesapeake's position has solid policy reasons behind it. As the House Report recognizes, it is a waste of everyone's time for cases to be shuttled back and forth between two courts that have jurisdiction, and the waste is exacerbated where the case has been removed, litigated at the federal level for quite some time, and then, due to a late-raised issue of defective removal, remanded. Moreover, the House Report also recognizes the unsavory possibility of a plaintiff keeping a defect in removal on reserve as an escape hatch should the federal litigation begin to bode ill. These policy concerns counselling a short time limit for motions to remand no doubt apply to all non-jurisdictional grounds for remand, including a forum selection clause. However, a district court in the proper exercise of its discretion may deny as untimely a non-procedural-defect, non-jurisdictional motion to remand if made at an unreasonably late stage of the federal litigation. *See* C. Wright, A. Miller, & E. Cooper, *Federal Practice & Procedure* § 3721 at 227-28 (1985). The policy concerns behind this rule, however, simply are not present in this case as Foster's motion was made on the 54th day after removal.

C. *Grounds For Remand*

After determining that the motion to remand was timely, the district court considered whether the forum selection clause – assuming that it did waive Chesapeake's right to remove, and was enforceable – was a proper ground for remand. The district court concluded that the clause was a proper, non-statutory ground for remand.

We agree – although a reasonable argument for the opposing view exists. It is undeniable that in *Cohill* the Court repeatedly stressed that its holding was limited to the context of pendent jurisdiction and was based on the nature of pendent jurisdiction – *i.e.*, that once the district court has *discretion* to decline *to exercise pendent jurisdiction* over the state-law claims by dismissing them, it has the power to remand them too. Here, of course, removal was based on diversity of citizenship, and the district court did *not* have *discretion* to decline to exercise jurisdiction: its *jurisdiction* was *mandatory*. Indeed, *Cohill* itself recognized this difference in distinguishing *Thermtron* when it said: "In *Thermtron*, the District Court had no authority to decline to hear the case. The court had diversity jurisdiction over the case, which is not discretionary. Thus, the District Court could not properly have removed the case from its docket, whether by a remand or a dismissal." 484 U.S. at 356, 108 S.Ct. at 621-22. Arguably, then, *Cohill* and *Thermtron* taken together could stand for the proposition that non-statutory remands are only authorized when the district court has discretion not to exercise pendent jurisdiction over the case. *See Hughes v. Ohio Bell Telephone Co.*, 916 F.2d 367, 372 (6th Cir. 1990). We believe, however, that this interpretation results from too narrow a reading of *Cohill*, the statutory

procedures for removal and remand, and the powers of the district court.

First of all, the circumstance that a remand is based on non-statutory grounds, though important post-*Thermtron*, is, post-*Cohill*, of diminished significance. *Cohill* clearly overruled *Thermtron* to the extent that *Thermtron* had held that only statutory grounds for remand are authorized.

The Court's opinion in *Thermtron* contained absolute language to the effect that the *only* grounds available for remand are those specified by section 1447(c). *See* 423 U.S. at 345, 96 S.Ct. at 590 ("the remand was for reasons not authorized by statute"); *id.* n.9 ("Lower federal courts have uniformly held that cases properly removed from state to federal court within the federal court's jurisdiction may not be remanded for discretionary reasons not authorized by the controlling statute"); *id.* at 351, 96 S.Ct. at 593 ("we are not convinced that Congress ever intended to extend carte blanche authority to the district court to revise the federal statutes governing removal by remanding cases on grounds that seem justifiable to them but which are not recognized by the controlling statute").

Twelve years later, however, in *Cohill*, 484 U.S. 343, 108 S.Ct. 614, the Court found that the language in *Thermtron* "loses controlling force when read against the circumstances of that case." *Id.* at 355, 108 S.Ct. at 621. "The *Thermtron* decision," which, again, involved the *sua sponte* remand of a removed diversity action because of the congested state of the district court's docket, "was a response to a clearly impermissible remand, of a kind very different from that at issue here." *Id.* at 621, 108 S.Ct. at 356. In *Cohill* the district court remanded the pendent claims remaining in

a removed federal question case once the federal question counts of the complaint had been eliminated. It had already been settled that once such a situation presented itself the district court could, in the exercise of its discretion, *dismiss* the remaining pendent claims. The *Cohill* court took this rule a step further and concluded that

> a district court has discretion to remand to state court a removed case involving pendent claims upon a proper determination that retaining jurisdiction over the case would be inappropriate. The discretion to remand enables district courts to deal with cases involving pendent claims in the manner that best serves the principles of economy, convenience, fairness, and comity which underlie the pendent jurisdiction doctrine. Such discretion is precluded neither by the removal statute nor by our decision in *Thermtron*.

Id. at 357, 108 S.Ct. at 622.[9]

Thus, as the Court of Appeals for the Seventh Circuit recognized in *Rothner v. City of Chicago*, 879 F.2d 1402 (7th Cir. 1989) (where the main issue was the *reviewability* of the order of remand), "the [*Cohill*] Court in effect held, contrary to *Thermtron*, that § 1447(c) does not contain *all* of the permissible grounds for remand." 879 F.2d at 1406 (emphasis in original). And, as the dissent in *Rothner* put it in a useful formula with which the majority opinion in *Rothner* was in accord, *Cohill*

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9. Chief Justice Rehnquist and Justices White and Scalia dissented and would have held that the *Thermtron* language meant what it said — *i.e.*, "cases may be remanded only for reasons authorized by statute . . . ." *Cohill*, 423 U.S. at 354, 108 S.Ct. at 623 (White, J., dissenting), since the federal courts do not possess an inherent power to remand, *id.* at 360, 108 S.Ct. at 624.

> left us with three categories of grounds for remand: (1) those authorized by § 1447(c) and beyond the power of appellate review; (2) those not authorized by § 1447(c) but nonetheless lawful in principle and reviewable for error in execution (the example from [*Cohill*] is a remand of a pendent state claim after deciding the federal claim that authorized the removal); (3) those not authorized by § 1447(c) or anything else, and subject to automatic reversal (the example from *Thermtron* is a remand of a suit the district court thinks it is too busy to hear).

Id. at 1420.[10]

Section 1447(c), then, tells us that *either* defective removal procedure *or* lack of subject matter jurisdiction is *a* proper ground for remand. It also tells us that motions for remand grounded on the former are, and on the latter are not, governed by a 30-day time limit. Finally, as we have already noted, it tells us, in conjunction with section 1447(d), that remands based on either of these grounds are not reviewable by appeal or otherwise. But that is all. Section 1447(c) neither prohibits nor authorizes the order of remand here, based on a forum selection clause. It simply does not

10. In *Rothner*, the district court remanded after having determined that the defendant had waived its right to remove, prior to the expiration of the 30-day period given for removal, by participating in the initial state court proceedings. The court of appeals issued a writ of mandamus directing the district court to entertain the action, finding that the defendant had not waived its right to remove. The dissent argued that the district court's order of remand was made pursuant to section 1447(c), and thus was unreviewable under section 1447(d). Neither the majority nor the dissent, however, appears to have been troubled over whether waiver of removal is a proper ground for remand. Indeed, it seems that no post-*Cohill* forum selection case has addressed the issue.

address the issue. Borrowing from the language of *Cohill*, then, as no one doubts the district court's power to *dismiss* pursuant to a properly construed forum selection clause if a plaintiff violates the clause,[11] "Congress's silence in the removal statute does not negate the power to . . . *remand* . . . ." 484 U.S. at 354, 108 S.Ct. at 621 (emphasis added).[12]

That said, we have little doubt that a remand based on a forum selection clause is lawful. Unlike the district court in *Thermtron*, the district court here did not refuse to hear a case properly before it. Indeed, the district court in this case accepted jurisdiction and, in the exercise of that jurisdiction, determined, as a threshold matter on the merits, that Chesapeake had waived its right to remove the case – *i.e.*, that, pursuant to the parties' contract, the case ought not have been in federal court. Thus, while the district court did not have the discretion, as in *Cohill*, to decline to hear the case at all, once it determined that the clause barred Chesapeake from removing, it would have been committing clear error – and violence to the parties' contract – had it nevertheless continued to hear the case. Unlike the district court in *Thermtron*, then, the district court here, upon its view of the clause, *could* "properly have eliminated the case from its docket . . . by a dismissal."

11. *See* most recently *Carnival Cruise Lines, Inc. v. Shute*, 59 U.S.L.W. 4325 (U.S. Apr. 17, 1991).

12. We realize that our result may not be consistent with *Cooley v. Pennsylvania Housing Finance Agency*, 830 F.2d 469 (3d Cir. 1987), and *Levy v. Weissman*, 671 F.2d 766 (3d Cir. 1986), as they support the conclusion that the basis of a remand must be statutory. These cases, however, are not controlling for, as noted in *Cooley*, they are pre-*Cohill*. 830 F.2d at 475.

Cohill, 484 U.S. at 356, 108 S.Ct. at 622. Indeed, at that point it had *no* discretion whatsoever *not* to remove the case from its docket. In such a situation, again unlike *Thermtron*, a remand, as opposed to dismissal, does no harm to removal or diversity jurisdiction. Measured against the concerns raised by *Thermtron*, and by analogy to those raised in *Cohill*, we therefore believe that the district court's remand was lawful.

Moreover, as the passage from the House Report set forth *supra* demonstrates, Congress is concerned that removal procedure be handled in a manner that promotes economy, convenience, and fairness – the very concerns used by the Court to justify the remand in *Cohill*. It is manifest that in giving effect to a forum selection clause by remanding rather than dismissing a case, concerns of economy and convenience are promoted. Fairness, too, is forwarded by a remand for once the district court determines that a defendant has violated a forum selection clause by wrongfully removing a case, justice and common sense warrant that a remand, rather than a dismissal, be ordered. Otherwise a plaintiff proceeding in accordance with the parties' agreement will be penalized for the conduct of a defendant who does not. The district court in remanding merely exercised its powers to fashion a remedy for breach of the clause, giving "effect to the legitimate expectations of the parties, manifested in their freely negotiated agreement, by specifically enforcing the forum clause," *see The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 12, 92 S.Ct. 1907, 1914 (1972). The district court also thereby exercised its inherent powers to correct abuses of federal practice and procedure, vindicating the improper use of removal. Thus, if a defendant has

removed a case in violation of a forum selection clause, remand is a particularly appropriate and effective remedy for the wrong. In sum, a forum selection clause can properly be the basis of remand. *Cf. Corcoran v. Ardra Ins. Co.*, 842 F.2d at 31 (abstention in removed case was proper ground for remand).

D. *Forum Selection Clause As Waiver Of Right To Remove*

The forum selection clause in the reinsurance agreement provides:

> In the event the Retrocessionaire [Chesapeake] is not domiciled in the United States of America, and the Retrocessionaire fails to pay any amount claimed to be due hereunder, the Retrocessionaire, at the request of the Company [Mutual Fire], will submit to the jurisdiction of any court of competent jurisdiction within the United States and will comply with all requirements necessary to give such court jurisdiction; and all matters arising hereunder shall be determined in accordance with the law and practice of such court.[13]

The district court, engaging in contractual construction over which we exercise plenary review, *see, e.g., John F. Harkins Co. v. Waldinger Corp.*, 796 F.2d 657, 659 (3d Cir. 1986), *cert. denied*, 479 U.S. 1059, 107 S.Ct. 939 (1987); *Ram Constr. Co. v. American States Ins. Co.*, 749 F.2d 1049, 1053 (3d Cir. 1984), determined that the legal effect of the clause was to waive Chesapeake's right to remove. The right to remove may be waived, *see generally* J. Moore & B. Ringle, 1A *Moore's Federal*

13. Forum selection clauses are in rather widespread use throughout the insurance industry. *See, e.g., In re Delta Re Ins. Co.*, 900 F.2d 890, 892 (6th Cir. 1990).

Practice ¶0.157[9] at 149 (1990), and we agree with the district court that by consenting to "*submit*" to "*any court*" of competent jurisdiction "*at the request of the Company*," and to comply with all requirements necessary to give "*such court*" jurisdiction, Chesapeake agreed to go to, *and stay in*, the forum chosen by Mutual Fire.

This construction is in accord with a long line of cases treating similar language which found that the forum selection clauses waived the defendant's right to remove, and which therefore granted the plaintiff's motion to remand. *See West Chestnut Realty of Haverford, Inc. v. First State Ins. Co.*, 1990 WESTLAW 87377 (U.S.D.C., E.D. Pa. 1990); *Cessna Aircraft Co. v. Fidelity & Cas. Co. of New York*, 616 F. Supp. 671 (D.N.J. 1985); *Capital Bank & Trust Co. v. Associated Int'l Ins. Co.*, 576 F. Supp. 1522 (M.D. La. 1984); *Himes v. Admiral Ins. Co.*, 575 F. Supp. 312 (E.D. Ky. 1983); *Lavan Petroleum Co. v. Underwriters at Lloyds*, 334 F. Supp. 1069 (S.D.N.Y. 1971); *Perini Corp. v. Orion Ins. Co.*, 331 F. Supp. 453 (E.D. Cal. 1971); *Oil Well Serv. Co. v. Underwriters at Lloyd's London*, 302 F. Supp. 384 (C.D. Cal. 1969); *Euzzino v. London & Edinburgh Ins. Co.*, 228 F. Supp. 431 (N.D. Ill. 1964); *General Phoenix Corp. v. Malyon*, 88 F. Supp. 502 (S.D.N.Y. 1949). We also note that the clause in this case provides that matters arising out of the reinsurance agreement are to "be determined in accordance with the law *and practice* of *such* court," and, in a separate paragraph, that Chesapeake agrees to "abide by the final decision of *such* court" – *such* court, of course referring to the court to which Chesapeake agreed to submit at the request of Mutual Fire. Thus, Chesapeake's removal was particularly

violative of these portions of the clause, for removal prevents *such* court from rendering a final decision, and while the substantive law to be applied by the federal court upon removal of this diversity action would still be that applied in the state court, the *practice* of the federal courts rather than that of the Commonwealth Court of Pennsylvania would govern the matter. *See Euzzino*, 228 F. Supp. at 433; *General Phoenix*, 88 F. Supp. at 503.[14] This, together with the rest of the clause's language, convinces us that Chesapeake waived its right to remove the action.[15]

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14. Indeed, in *Roberts v. Lexington Ins. Co.*, 305 F. Supp. 47 (E.D.N.C. 1969), concentrating on "*the practice*" portion of "all matters arising hereunder shall be determined in accordance with the law and practice of such court," the court held that this language constituted an *express prohibition* against removal. However, employing a legal theory subsequently rendered outmoded by the Supreme Court in *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 92 S.Ct. 1907, the *Roberts* court refused to enforce the clause, finding it an illegal attempt to "oust" the federal courts of their jurisdiction. *See also Hasek v. Certain Lloyd's Underwriters*, 228 F. Supp. 754 (W.D. Mo. 1963) (clause illegal and void contractual limitation of court's jurisdiction). In *The Bremen*, however, the Court said that forum selection clauses do not "oust" courts of jurisdiction, and held that they are *prima facie* enforceable.

15. We note that in *In re Delta Re Ins. Co.*, 900 F.2d 890, the Court of Appeals for the Sixth Circuit, construing virtually the same clause as that involved here, reversed an order of remand, holding that the clause did not work a waiver of the right to remove. In *Delta*, the defendant, a commercial bank branch of a foreign sovereign, removed a state court action pursuant to 28 U.S.C. § 1441(d), a part of the Foreign Sovereign Immunity Act (FSIA), which extends removal to actions brought against foreign states and which permits the foreign state to demand a non-jury trial once in federal court. The court of appeals turned to the language of the clause and, utilizing a standard it had applied in an earlier forum-selection / waiver-of-removal case — *Regis Assocs. v. Rank Hotels (Management) Ltd.*, 894 F.2d 193 (6th Cir. 1990)

See C. Wright, A. Miller, & E. Cooper, 14A *Federal Practice & Procedure* § 3721 at 223 (1985) (finding

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—, found that the clause did not "clearly and unequivocally" reveal an intent to waive the right to remove. The court then proceeded, however, to explain that this finding was especially bolstered by the language and purpose of section 1441(d). As the section gave foreign sovereigns the unqualified right to remove actions commenced against them in state court, and thus avoid "any local bias or prejudices possibly inherent in state court proceedings and also to avoid trial by jury," 900 F.2d at 893, the court could "conceive of no reason why a foreign state would waive a right of removal. Since the FSIA allows a foreign state to remain in a state court if sued there and have a jury if desired, there is absolutely nothing to be gained by giving up the option to go to federal court and avoid a jury trial." *Id.* Finally, noting that the FSIA represents a drastic departure from the previously long-standing rule granting foreign sovereigns absolute immunity, and that under the FSIA immunity nevertheless remains an important threshold consideration, the court felt that the purposes behind the FSIA, and section 1441(d) in particular, are best served by the development, *in federal court*, of a uniform body of law on sovereign immunity in the FSIA era. 900 F.2d at 894. Obviously viewing the element of foreign sovereignty of paramount importance, the court concluded: "In order to provide maximum guidance for future cases involving foreign states, we hold that any claimed waiver of the right of removal stemming from contractual language must be explicit." *Id.* at 894 (footnote omitted). Inasmuch as we believe *Delta* was primarily driven by considerations peculiar to the FSIA, we do not find it persuasive here.

Moreover, we do not see why contractual waivers of the right to remove must be "clear and unequivocal." True, no less a commentator than Professor Moore states the proposition broadly: "Waiver of the right to remove is . . . possible but defendant's intent must be clear and unequivocal." J. Moore & B. Ringle, 1A *Moore's Federal Practice* ¶0.157[9] at 152. *See also Weltman v. Silna*, 879 F.2d 425, 427 (8th Cir. 1989) (same; citing *Moore's*). But Moore makes his statement solely in the context of a discussion of waiver of removal by the defendant's participation in state court proceedings. *See generally Moore's* ¶0.157[9] at 149-55. And, indeed, the cases cited by *Moore's*, and by the Court of

Appeals for the Sixth Circuit in *Delta* and *Regis*, either involved non-contractual, litigation-based waivers, *see Kiddie Rides U.S.A., Inc. v. Elektro-Mobiltechnik GMBH*, 579 F. Supp. 1476 (C.D. Ill. 1984); *Carpenter v. Illinois Cent. Gulf R.R. Co.*, 524 F. Supp. 249 (M.D. La. 1981); *Hildreth v. General Instrument, Inc.*, 258 F. Supp. 29 (D.S.C. 1966); *Champion Brick Co. of Baltimore County v. Signode Corp.*, 37 F.R.D. 2 (D. Md. 1965); *Rockwell v. United States Fidelity & Guar. Co.*, 137 F. Supp. 317 (M.D. Pa. 1955); *Davilla v. Hilton Hotels Int'l, Inc.*, 97 F. Supp. 32 (D.P.R. 1951); or, in turn, cited non-contractual waiver cases or *Moore's*, *see Capital Bank & Trust Co. v. Associated Int'l Ins. Co.*, 576 F. Supp. 1522 (M.D. La. 1984); *Morgan Dallas Corp. v. Orleans Parish School Bd.*, 302 F. Supp. 1208 (E.D. La. 1969). In the context of litigation-based waiver, the "clear and unequivocal" standard makes sense. Otherwise, in order not to waive the right to remove defendants would have to remain inactive in the state court, running the peril of being held in default should a remand from the district court later occur. *See Moore's* ¶0.157[9] at 154.

In the context of contractual waiver, however, we do not perceive the need for the "clear and unequivocal" standard. While it is true that removal represents what has somewhat reverently been called "a statutory right to a federal forum" (a right the Supreme Court was obviously willing to vindicate in *Thermtron*), this talismanic phrase loses much of its fire in light of the fact that for "approximately five score years" the federal courts "have construed the removal statutes *strictly* and, on the whole, *against* the right of removal." *Moore's* ¶0.157[1.-3] at 38 (emphasis added). The "clear and unequivocal" standard, then, fails to consider the *constrictive* rather than *expansive* nature of the right of removal, in addition to serving no meritorious policy of litigation. It probably had its genesis in the notion, now discarded, that forum selection clauses were presumptively *unenforceable* as "contrary to public policy" or as an illegal attempt to "oust" the court's jurisdiction. The Supreme Court has said that this notion is old-fashioned and contrary to freedom of contract. *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. at 10-12, 92 S.Ct. at 1913-14.

We think the "clear and convincing" standard so stringent as to be contrary to the right of parties to contract in advance regarding where they will litigate. A court simply should determine contractual waiver of the right to remove using the

"persuasive" cases which construe this clause as valid waiver of removal).[16]

E. *Enforceability of the Forum Selection Clause*

Finally, we agree that the clause is enforceable in this case.[17] In *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 92 S.Ct. 1907, the Supreme Court

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same benchmarks of construction and, if applicable, interpretation as it employs in resolving all preliminary contractual questions. Indeed, inasmuch as the determination of whether there is a waiver of the right of removal to be derived from a forum selection clause will at least in some cases, such as here, be a matter of construction and thus of law, it seems anamolous to speak of a "clear and unequivocal" standard for we simply make plenary determinations of legal issues.

16. Chesapeake regards *Patten Securities Corp. v. Diamond Greyhound & Genetics, Inc.*, 819 F.2d 400 (3d Cir. 1987), as "closely analogous" to this case but we do not. There a customer of a securities dealer sought to arbitrate a claim against the dealer. In a reversal of the usual pattern in such cases, the dealer preferred a judicial tribunal for resolution of the dispute and thus brought an action against the customer in the district court for declaratory relief and, alternatively, for damages. In the district court the dealer sought an order to compel the customer to discontinue the arbitration contending, *inter alia*, that the customer waived the right to arbitrate by agreeing to a forum selection clause consenting to the jurisdiction of the state and federal courts in New Jersey. We rejected this contention for various reasons including the circumstance that while we regarded arbitration as favored, forum selection clauses must be scrutinized carefully so that "if doubts arise as to whether this dispute is arbitrable or not, such doubts must be resolved in favor of arbitrability." *Id.* at 407. No such consideration of preferred forum is implicated in remanding this case as there is no reason for a preference for a federal over a state court in this action. *See* note 15, *supra*.

17. We will assume that our review is plenary on this essentially factual issue as the matter was resolved in the district court on a record developed on a motion. But the standard of review on this point is not critical as Chesapeake's position on it is completely insubstantial.

held that forum selection clauses are "prima facie valid and should be enforced unless enforcement is shown by the resisting party to be 'unreasonable' under the circumstances." *Id.* at 10, 92 S.Ct. at 1913. A forum selection clause is "unreasonable" where the defendant can make a "strong showing" *id.* at 15, 92 S.Ct. at 1916, *either* that the forum thus selected is "so gravely difficult and inconvenient that he will 'for all practical purposes be deprived of his day in court," *id.* at 18, 92 S.Ct. at 1917, *or* that the clause was procured through "fraud or overreaching," *id.* at 15, 92 S.Ct. at 1916. *No* showing – let alone a "*strong* showing" – of either of these elements was made by Chesapeake. Chesapeake admits that by the clause it waived any claim to inconvenience of forum, and the agreement between it and Mutual Fire was clearly an arms'-length deal, between sophisticated commercial entities, "unaffected by fraud, undue influence, or overweening bargaining power," *cf. id.* at 12, 92 S.Ct. at 1914. That there may not have been actual negotiations over the clause does not affect its validity. *See Carnival Cruise Lines, Inc. v. Shute*, 59 U.S.L.W. 4323, 4325 (U.S. Apr. 17, 1991). In general, the insurance industry has obviously long found it a convenient and expeditious provision to include in its contracts where it binds the insurer, *see* n.13, *supra*, and it is a particularly fair provision in a reinsurance treaty, as it allows the ceding company, rather than the many and far-flung retrocessionaires, to select the forum when the retrocessionaires have refused to pay.

III.

CONCLUSION

In light of the foregoing we conclude that: (1) our jurisdiction over this appeal is not barred by 28 U.S.C. § 1447(d) and the district court's order of remand was "final" for the purposes of 28 U.S.C. § 1291; (2) Foster's motion to remand was not barred by the 30-day time limit of 28 U.S.C. § 1447(c); (3) enforcement of a waiver of the right to remove is a proper ground for remand; (4) Chesapeake waived its right to remove in the forum selection clause of its contract with Mutual Fire; and (5) the clause is enforceable. Accordingly, we will affirm the order of September 27, 1990, of the district court remanding this case to the Commonwealth Court of Pennsylvania.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

(The Court resumed the proceedings at 11:55 a.m.)

THE COURT: This is a diversity action removed to this court from the Commonwealth Court, where it was initiated September 29, 1989. The lawsuit was one brought by Constance Foster in her capacity as Insurance Commissioner of the Commonwealth. The defendant, Chesapeake, is a Bermuda-based and incorporated insurance company

The suit was brought by Ms. Foster in her capacity as rehabilitator of the insolvent Mutual Fire, Marine & Inland Insurance Company. Suit was brought as part of the Commissioner's obligation to collect assets of the insolvent Mutual Fire based upon a group of reinsurance treaties which involve, among others, obligations by Chesapeake to Mutual, obligations which, on the expiration of the reinsurance treaties, were embodied in a reinsurance deposit trust agreement.

Suffice it to say, that the basic purpose of the lawsuit brought by Ms. Foster is to recover in the name of Mutual Fire, and on behalf of Mutual Fire's multiple creditors, sums allegedly due to Mutual Fire from Chesapeake under the agreed insurance arrangements.

Defendant Chesapeake removed this action to this court on October 19, 1989. Approximately a week later—to be precise, on October 25—this court, pursuant to a stipulation between the parties, entered an order reciting that "Plaintiff may have until December 11, 1989 to file a motion to remand based on any defect in the removal procedure under 28 USC Section 1447(c). These extensions are without prejudice to the rights of either party, and shall not be deemed to constitute a waiver of any rights of either party."

The plaintiff did then move to remand on December 11th, 1989, the date on which the stipulation expired. The grounds on which plaintiff has sought remand are, one, that Mutual Fire and Chesapeake had incorporated into their contractual arrangements, in particular, into the so-called companion

line agreement, a forum selection clause which constituted, among other things, a waiver of Chesapeake's entitlement to remove this action or any other covered by the agreement from a state court to a federal court.

The second ground on which plaintiff moved to remand was the submission that this case is one in which it would be a proper exercise of this court's discretion to abstain with a view to having the issues addressed in the Commonwealth Court.

There have been numerous submissions since the filing of the motion to remand. The parties have requested delays in the disposition of the motion. That is why it is only now before us. Argument has been held this morning, and the motion is now ripe for disposition.

As an initial matter, defendant Chesapeake contends that the motion to remand is untimely. As noted before, the parties entered into a stipulation which contemplated that plaintiff would have until December 11, 1989 "to file a motion to remand based on any defect in the removal procedure under 28 USC Section 1447(c)."

Plaintiff did, in fact, move by December 11, but it is defendant's submission that the stipulation does not help the plaintiff, because the grounds on which plaintiff has sought remand are not grounds which, within the meaning of the stipulation, are "based on any defect in the removal procedure under 28 USC Section 1447(c)."

Moreover, defendant points out Section 1447(c), with a view to which, quite evidently, the stipulation as drafted contains a provision specifying that "a motion to remand the case on the basis of any defect in the removal procedure must be made within 30 days after the filing of a notice of removal under Section 1446(a)."

It is undisputed that the motion to remand was filed more than 30 days after the filing of the notice of removal. So it is

defendant's position that the motion to remand is untimely under the statute, and that the stipulation does not help the plaintiff, because the motion that was filed was not one which addresses "any defect in removal procedure."

The completion of the argument on timeliness would be that even if the stipulation would be thought to comprehend a motion based on the grounds that plaintiff is advancing, the stipulation, nothwithstanding that it was approved by this court, is incapable of extending the statutory 30-day limitation contained in 1447(c).

It is not contended by the plaintiff that either the abstention ground or the forum selection ground could be regarded as a ground of remand that would become comprehended within the "any defect in removal procedure." So plaintiff, in urging the timeliness of the motion, is not relying, and cannot rely, on the stipulation.

However, plaintiff rejects the view that the quoted language from 1447(c) specifying that "a motion to remand the case on the basis of any defect in the removal procedure must be made within 30 days after the filing of a notice of removal," forecloses the motion to remand which plaintiff has submitted. The position taken by the plaintiff is that the 30-day limitation is applicable simply to motions which are bottomed on "any defect in removal procedure," and that 1447(c) is silent with respect to the timing of other types of motion to remand.

The defendant's position is that a proper understanding of 1447(c), which is statutory language adopted in 1988, can best be gleaned from reference to House Report Number 100-889, which discusses the new language in 1447(c), together with many other changes in the judicial code accomplished by the Judicial Improvements Act of 1988.

The particular language which defendant relies on is as follows: "The amendment provides a period of 30 days within which remand must be sought on any ground other than lack

of subject matter jurisdiction." The exception of motions based on lack of subject matter jurisdiction is keyed to the second sentence of 1447(c). The second sentence reads: "If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded."

In short, the position of the defendant, certainly bolstered by the language of the House Report, is that remand is governed comprehensively by Section 1447(c); that remand, within the purview of the statute, contemplates two types of circumstances. One of those is where there is "any defect in removal procedure," and the other is where there is a failure of subject matter jurisdiction.

In short, any ground for remand – that is defendant's contention – which is not addressed to lack of subject matter jurisdiction, is comprehended under the statutory phrase, "defect in removal procedure." If that position be correct, then defendant is right in contending that plaintiff's motion is here untimely, since the grounds urged for remand, the forum selection clause and abstention, are not grounds that go to the jurisdictions of this court, but rather to the appropriateness of its exercise.

There is no question that the language of the House Report strongly supports the construction urged by the defendant. In stating, as the report does, that "the amendment provides a period of 30 days within which remand must be sought on any ground other than lack of subject matter jurisdiction," that the report certainly would lead one to the conclusion that the 30-day limitation comprehends all remand motions other than those going to the subject matter jurisdiction.

The problem, however, is that the language of 1447(c) does not in terms correspond with the language of the House Report. The language is directive that the 30-day limitation apply to every "motion to remand the case on the basis of any defect in removal procedure."

Now, that syntax is consistent with the possibility that Congress regarded all non-subject matter jurisdiction motions as motions based on a "defect in removal procedure." But that language does not compel that conclusion.

Accordingly, since I feel that it is my obligation to be guided in the first instance by the text of the statute, and to look to the guidance of the House Report or some other form of legislative history only when the text is not itself dispositive, I conclude that the text directs me to limit the 30-day time limit to motions which indisputably are bottomed in a "defect in removal procedure."

That is to say, I conclude, therefore, that there is no time limit specified by 1447(c) for any remand motion which is not based on a "defect in removal procedure," whether that be of a jurisdictional nature or otherwise, provided that there is a category of non-subject matter jurisdiction grounds for remand, and non-"defect in removal procedure" grounds for remand that a district court has power to entertain.

Whether there is such a third category is not, in my judgment, decided by the text of 1447(c), and I am not prepared to read into the House Report a preclusion of the possibility of such an intermediate category of remand motions, unless I am persuaded by the prehistory of Section 1447(c), that that indeed is the jurisprudential heritage against which Section 1447(c) in its new form was enacted.

Accordingly, the question of the timeliness of the plaintiff's motion is a question which itself tenders the larger question, whether abstention on the one hand, and a forum selection clause on the other, constitute a category of grounds for remand that a federal district court has authority to entertain either within the rubric of 1447(c) or outside it.

The language of 1447(c), up to 1988, was of the following form: "If, at any time before final judgment, it appears that the case was removed improvidently and without jurisdiction,

the district court shall remand the case and may order the payment of just costs." It is apparent from a reading of that language that Congress has good reason to want to introduce a time period within which at least some very large category of remand motions would have to be filed at an early date.

The construction of Section 1447(c), with respect to the question of what sorts of motions to remand, were properly addressed within the phrase, "removed improvidently and without jurisdiction," came before the Supreme Court of the United States in 1976, in Thermtron. In that case, which was a diversity case, the district judge remanded a removed case on the ground that his docket was so heavy, that the plaintiff would be able to move the case forward more expeditiously in the state court, and, hence, removal would unjustifiably delay the plaintiff in the achievement of plaintiff's entitlements.

The Supreme Court concluded that remand on the assigned ground was inappropriate. The Supreme Court appeared to determine that remand was available only on grounds specified by the statute, those grounds being at the time, lack of jurisdiction and improvident removal. Neither of those grounds being present in Thermtron, the District Court's order was set aside, or directed to be set aside.

Five years after Thermtron, the Seventh Circuit in Ryan considered the question whether remand on abstention grounds was permissible, and the Seventh Circuit concluded – following and in reliance on Thermtron – that abstention was not embraced within the remand scheme contained in 1447(c), and directed that the remand order be abrogated.

In 1988, the Supreme Court revisited 1447(c) in the Cohill case. There a district court had remanded the state law claims, which had been pendent to a case removed to the federal court, on the basis of a federal question count. Remand was directed by the district court at a point in the litigation at which the federal claim had dropped away, concluding at that point that the Gibbs doctrine of discretionary entertaining of pendent state

claims dictated that, with the disappearance of the federal claim, it would be a sound exercise of discretion to remit the state claims to the state court. The district court then entered an order of remand.

The three judge panel, which first reviewed the district court's decision in Cohill, concluded two-to-one that under Thermtron, and a subsequent decision in this Circuit, Levy, since the remand of pendent state claims – of initially pendent state claims was not comprehended by 1447(c), the remand order was unauthorized.

On further examination of the issue en banc, the Court of Appeals for this Circuit was evenly divided, and, accordingly, rendered no opinion. The even division en banc had the effect of affirming the district court's order. Accordingly, the matter was reviewed by the Supreme Court presumably to determine whether the remand, as affirmed by the Court of Appeals, contravened Thermtron. The divided Supreme Court affirmed the Third Circuit and the judge who had ordered remand.

Through Justice Marshall, the Cohill court concluded that Thermtron did not preclude the exercise by a federal court of its discretionary authority to decline to pursue pendent state claims when the federal claim, to which they were pendent, had disappeared from the litigation. Justice Marshall noted that where such litigation was begun in the federal court, the federal court, at the point at which it concluded that its discretion called for discontinuance of consideration of the state claims, would dismiss as to those claims. Justice Marshall, for the Court, concluded that in a situation in which the case had been begun in a state court, and had been removed, the sensible procedure was to remand to the state court.

Thermtron was not to the contrary. Thermtron, the Court concluded, was a case in which the federal court, having on its docket a diversity case which it had no discretion to decline to entertain, had no authority to remand to the state court.

Subsequent to Cohill, about two months later, the Second Circuit, in Corcoran v. Ardra, revisited the question which had confronted the Seventh Circuit in Ryan. That is the say, the Second Circuit addressed the question whether a federal district court had authority to remand to a state court a case removed from the state court to the federal court, where the ground for remand was abstention. The case was a case very like the case before this court today; that is to say, it was a case brought by New York's Insurance Commissioner to recover assets of an insolvent insurance company. Removal was effectuated not on diversity grounds, but on the basis of Section 205 of Title 9.

Section 205 specifies that "Where the subject matter of an action or proceeding pending in a state court relates to an arbitration agreement or award falling under the convention [the foreign arbitral awards convention], the defendant or the defendants may, at any time before the trial thereof, remove such action or proceeding to the district court of the United States for the district and division embracing the place where the action or proceeding is pending."

In a case removed on that basis, the Court of Appeals for the Second Circuit decided that the district court had rightly concluded that remand was appropriate for the reason that the litigation being carried on by the superintendent of insurance was litigation of a sort that so intimately involved complex and obscure and important matters of state insurance law of a regulatory nature, that it would be better for the case to be handled under the Burford abstention doctrine than the state courts.

The decisions in Cohill, and thereafter in Ardra, were in the last year of the previous life of 1447(c). There has been no litigation brought to my attention since which would cast any different view on what 1447(c) in its old language contemplated.

In my judgment, the Second Circuit, looking at the remand authority in the light of Cohill, came to the correct conclusion to decide that a district court lacked authority to remand the

case in which sound abstention doctrine called for it not to be dealt with, at least in the first instance in the federal courts, which would apparently mean that the federal court would be limited to dismissal or perhaps a stay of federal court proceedings while the parties made their own way back perhaps to a state court. Such untidy alternatives would not seem a maximal way to manage the judicial process as against simply returning the litigation to the court system in which it was initiated.

Accordingly, I conclude that Judge Kearse's decision in Corcoran versus Ardra was a very soundly based extrapolation from the Supreme Court's decision in Cohill just two months before.

Does 1447(c) in its new linguistic dress change the result? I think not. We know that 1447(c) introduced a time limit, namely 30 days, with respect to a certain category of motions to remand, namely those which could be regarded as being based on "any defect in removal procedure." The grounds for removal tendered in the present case, the parties agree and so do I, cannot be categorized as grounds bottomed in "any defect in removal procedure."

Accordingly, if there is a category of remand motions which are not based on a "defect in removal procedure," and which are not based on "lack of subject matter jurisdiction", then such motions are simply not comprehended by the 30-day limitation, nor indeed are they foreclosed as a matter of substantive availability by Section 1447(c).

I have concluded, on the basis of the cases running from Thermtron through Corcoran versus Ardra, that the predecessor language of 1447(c) did indeed contemplate that there would be remand motions that were not within the then phrase "improvidently granted," and that were not within the provision "for lack of jurisdiction by." Similarly, I conclude that 1447(c), as now written, does comprehend, by negative implication under the case law, that there is a third category of cases, and today's litigation belongs in that category, which are not constrained by the 30-day limitation, and which are not also confined to jurisdictional challenges.

This means, in short, that I conclude that the plaintiff's motion to remand, A, is timely, and, B, offers at least one ground, namely that of abstention, which can be entertained, as the Second Circuit instructed in Corcoran versus Ardra, by a District Court as a permissible category of remands.

Is the other ground, the forum selection clause claim, also within the subset of non-jurisdictional and non-defect in removal procedures ground for remand? I think so. To conclude that a district court could not entertain a motion to remand, bottomed on a claim that the removing party had waived its entitlement to remove, would make such a forum of waiver ineffective, unvindicatable in the federal courts.

There is nothing in the language of 1447(c) that should lead to such an anomalous result, and the case gloss on 1447(c)'s predecessor, by which I mean particularly Cohill and Corcoran versus Ardra itself, contemplate a more sensible resolution.

I will consider first the question whether the forum selection clause in this case constitutes a waiver of the privilege of removal by Chesapeake. The language of the so-called companion line agreement, which is relied on by plaintiff, is as follows: "In the event that the retrocessionaire is not domiciled in the United States of America, and the retrocessionaire fails to pay any amount claimed to be due hereunder, the retrocessionaire, at the request of the company, will submit to the jurisdiction of any court of competent jurisdiction within the United States, and will comply with all requirements necessary to give such court jurisdiction, and all matters arising hereunder shall be determined in accordance with the law and practice of such court."

The quoted language is entirely silent with respect to removal. However, the decided cases show that language in all relevant respects, identical with the quoted language, has on several occasions been construed as plaintiff contends it should be construed, to constitute a waiver of the removal privilege.

Back in 1971, a federal district court in California, in Perini Corporation versus Orion Insurance Company, dealt with the following language: "Insurers hereon, at the request of the assured, will submit to the jurisdiction of any court of competent jurisdiction within the United States of America and will comply with all the requirements necessary to give such court jurisdiction, and all matters arising hereunder shall be determined in accordance with the law and practice of such court." The language in that case is, I believe, verbatim with the language that is presented in our case, starting with the words, "will submit to the jurisdiction of any court of competent jurisdiction within the United States."

In Perini, the Court had this to say: "The meaning of the service of suit clause is generally clear. It purports to compel the insurer to submit to the forum chosen by a dissatisfied policyholder who sues to recover proceeds owing under the policy. While it does not in terms waive the insurer's rights to remove to a federal forum, most courts have nonetheless determined that 'submission' to a state forum is a waiver of the insurer's right to defend in federal court."

The Perini court then went on to cite four somewhat earlier cases, starting in 1949, and running up to 1969, all of them decisions of federal district courts. The Perini decision, which has been on the books for some years when the language that governs this aspect of plaintiff's motion was written into the companion line agreement, has continued to be regarded as a proper construction of the same or very similar language.

Thus, in 1985, in Cessna Aircraft versus Fidelity and Casualty Company, 616 F. Supp., 671, Judge Cohen, sitting in New Jersey, dealt with language which ran as follows: "Will submit to the jurisdiction of any court of competent jurisdiction within the United States, and will comply with all requirements necessary to give such court jurisdiction and all matters arising hereunder shall be determined in accordance with the law and practice of such court."

Judge Cohen said at page 674, "Language identical to that in issue here has consistently been held to constitute a waiver, by the insurer, of its right to remove an action from State Court to Federal Court." Judge Cohen then cited a series of cases, including Perini, and two on which Perini had relied, and also two subsequent cases, Capital Bank and Trust from Louisiana, at 576 Fed. Supp., and Lavan Petroleum, 334 Fed. Supp., in the Southern District of New York in 1971.

To be sure, very recently, in January of this year, the Court of Appeals for the Sixth Circuit took a contrary view of language again interchangeable with the language we have here. The Sixth Circuit in In Re: Delta America Re Insurance Company, in Liquidation, which is a 1990 U.S. App. Lexis 4641, decided on March 30 of this year—the case is now reported, but I don't have the reporting citation in front of me. The Sixth Circuit concluded that the quoted language did not constitute a waiver of removal. The Court emphasized that the courts should demand observance of a very strict standard before finding of waiver of the removal privilege, a principle with which I have no quarrel. But what the Sixth Circuit evidently found, was of particularly compelling importance in its consideration of the case, was that among the removing parties was Banco de Seguros del Estado, which predicated removal "upon its status as a foreign sovereign, as defined by the Foreign Sovereign Immunity Act."

How crucial that aspect of the case was is suggested by the Court's observation at page six, text at note six. "Returning for the moment to the question of intent of the parties, we can conceive of no reason why a foreign state would waive a right of removal. Since the FSIA allows a foreign state to remain in a state court if sued there and have a jury if desired, there is absolutely nothing to be gained by giving up the option to go to federal court and avoid a jury trial."

More to the point, the very first sentence in the Sixth Circuit's opinion is as follows: "The issue presented by this appeal is the right of an agency or instrumentality of a foreign state to remove a state court contract action to federal court despite

a forum selection clause in the contract, which states that jurisdiction to resolve contract disputes will lie in 'any court of competent jurisdiction within the United States.'"

I agree that a waiver of privilege of removal should not be lightly inferred. In the case before us, Chesapeake and Mutual Fire adopted language in the early 1980's, which had been the subject of substantial litigation, as the Perini opinion demonstrates.

As of 1971, the Perini Court had found that the language which Chesapeake and Mutual Fire utilized, was language which "most courts" have found constituted a waiver of the privilege of removal. Under such circumstances, it seems to me the reasonable conclusion is that the contracting parties assumed the gloss on the contractual language which was of longstanding.

I am not moved by the arguments advanced by defendant, that the language was Mutual Fire's take-it-or-leave-it language. It may well have been Mutual Fire's form language, but I am not persuaded that Chesapeake was not in a position, through counsel, to negotiate for preservation of its privilege of removal, if it were really concerned about the issue.

I come to the conclusion, therefore, that the quoted forum selection clause does constitute, in the litigation before me, a waiver of the privilege of removal by Chesapeake. The contrary result in the Sixth Circuit, in the Delta American case, is a result which, as I read the Sixth Circuit's opinion, is at least substantially rooted in the special circumstance that the removing party appeared in the status of a foreign sovereign.

At all events, the construction which the Sixth Circuit in 1990 has given to the language at issue is hardly a construction which was relied on, or could have been relied on, by Chesapeake or Mutual Fire. In their consideration of what language should go into the agreements made between them back in the early '80's, at that time, and indeed since that time, up until the Delta American decision language of the kind at issue here, it seems

almost uniformly to have been recognized as accomplishing a waiver of the removal privilege.

Having reached this conclusion, I come to the further conclusion that plaintiff is entitled to an order from this court remanding this case to the Commonwealth Court, the Court selected by the plaintiff standing in the shoes of Mutual Fire.

In view of this disposition of the motion, it is unnecessary for me to consider the intriguing abstention issues that have been tendered. I will enter an order remanding this case to the Commonwealth Court for the reasons that I have outlined.

I thank you all for your patience.

(Court adjourned the proceedings at 1:10 p.m.)

Supreme Court, U.S.
FILED
SEP 17 1991
OFFICE OF THE CLERK

(2)

No. 91-287

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

CHESAPEAKE INSURANCE COMPANY, LIMITED,

Petitioner,

vs.

CONSTANCE B. FOSTER, Insurance Commissioner of the Commonwealth of Pennsylvania, as Rehabilitator of The Mutual Fire, Marine and Inland Insurance Company,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Whether the district court's remand order would be reviewable under 28 U.S.C. § 1447(d) (1964), which bars review of a remand order based on a "defect in removal procedure" under 28 U.S.C. § 1447(c) (1988), where Petitioner now characterizes the district court's remand order as one based on a "defect in removal procedure."

Whether the Third and Fifth Circuits' decisions are consistent where both courts have held that the thirty-day filing limit under 28 U.S.C. § 1447(c) applies only to a remand motion based on a "defect in removal procedure."

Whether the Third Circuit's decision is consistent with this Court's holdings in *Carnegie-Mellon University v. Cohill*, 484 U.S. 343 (1988) and *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336 (1976) where the Third Circuit held that the district court was authorized to remand a removed case in order to enforce the parties' forum selection agreement.

Whether the Third Circuit's decision that Petitioner, a non-foreign state defendant, waived its right to remove, conflicts with the Sixth Circuit's decision in *In re Delta America Re Insurance Co.*, 900 F.2d 890 (6th Cir.), *cert. denied*, 111 S. Ct. 233 (1990), which applies exclusively to removal by a foreign state under the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602-1611 (1976).

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No. 91-287

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

CHESAPEAKE INSURANCE COMPANY, LIMITED,

Petitioner,

VS.

CONSTANCE B. FOSTER, Insurance Commissioner of the Commonwealth of Pennsylvania, as Rehabilitator of The Mutual Fire, Marine and Inland Insurance Company,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JURISDICTION

This Court has jurisdiction to review the decision of the United States Court of Appeals for the Third Circuit by writ of certiorari under 28 U.S.C. § 1254(1) (1940).

The Third Circuit had jurisdiction to review the remand order of the United States District Court for the Eastern District of Pennsylvania because it was a collaterally final order pursuant to 28 U.S.C. § 1291 (1982). *Clorox Co. v. United States Dist. Court*, 779 F.2d 517, 520 (9th Cir. 1985); *Pelleport Investors, Inc. v. Budco Quality Theatres, Inc.*, 741 F.2d 273, 276-78 (9th Cir. 1984). Furthermore, review of the remand order was not

barred by 28 U.S.C. § 1447(d), which precludes review of a remand order issued under 28 U.S.C. § 1447(c). As Petitioner argued below, the district court's remand order was not based on a ground specified within 28 U.S.C. § 1447(c), and thus, was reviewable. *Karl Koch Erecting Co. v. New York Convention Center Dev. Corp.*, 838 F.2d 656, 658-59 (2d Cir. 1988); *Clorox*; *Pelleport*.

However, Petitioner now contends that the district court's remand order was grounded in a "procedural defect in removal," under 28 U.S.C. § 1447(c). Under Petitioner's current characterization of the remand order, 28 U.S.C. § 1447(d) would preclude appellate review. *Thermtron*, 423 U.S. 336 (1976).

STATEMENT OF THE CASE

Respondent, Constance B. Foster, is the Insurance Commissioner of the Commonwealth of Pennsylvania. Respondent is the statutory Rehabilitator of an insolvent insurance company, The Mutual Fire, Marine and Inland Insurance Company ("Mutual Fire"). *See* 40 Pa. Cons. Stat. Ann. §§ 221.1-221.63 (Purdon Supp. 1990).[1] At all relevant times, Mutual Fire was a mutual property, casualty and special risks insurance company organized and licensed under the laws of the Commonwealth of Pennsylvania.[2]

Pursuant to a December 8, 1986 Order of the Commonwealth Court of Pennsylvania, Respondent controls the assets and affairs of Mutual Fire. In an effort to collect Mutual Fire's assets

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[1] As of December 31, 1988, Mutual Fire's deficit was over $400 million. At that time, the Mutual Fire insolvency was the country's third or fourth largest insurer failure. *Foster v. Chesapeake Ins. Co. Ltd.*, 933 F.2d 1207, 1210 n.3; A-4 n.3. (references to the Appendix in the Petition for Writ of Certiorari are designated as "A-____"; references to the Appendix in Respondent's Brief in Opposition are designated as "RA-____").

[2] Mutual Fire has no parent company. Mutual Fire's subsidiaries, as defined by Sup. Ct. R. 29.1, are: Endmark Data Processing Corporation; First New York Syndicate Corporation; and Ryansure Intermediaries, Inc.

for distribution to its creditors, Respondent has sued Petitioner in the Commonwealth Court of Pennsylvania for its failure to pay Mutual Fire over $4 million under a reinsurance contract.[3]

Petitioner and Mutual Fire executed the reinsurance contract in 1982. The contract contained a clause that provided Mutual Fire with the unilateral choice of forum in which to resolve any payment disputes (the "forum selection clause"). The clause provided, in relevant part:

> In the event the Retrocessionaire is not domiciled in the United States of America, and the Retrocessionaire fails to pay any amount claimed to be due hereunder, the Retrocessionaire, at the request of the Company, will submit to the jurisdiction of any court of competent jurisdiction within the United States and will comply with all requirements necessary to give such court jurisdiction. . . .

Chesapeake, 933 F.2d at 1216; A-20.[4]

Mutual Fire paid Petitioner the premiums due under their agreement. However, when Mutual Fire's underlying risks became actual liabilities, Petitioner failed to pay the reinsurance due Mutual Fire. On September 29, 1989, Respondent sued Petitioner in the court overseeing Mutual Fire's rehabilitation, the

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[3] A reinsurance contract is an indemnity agreement between insurance companies under which one company, the reinsurer or retrocessionaire (in this case, Petitioner), agrees to reinsure risks written by the other (in this case, Mutual Fire). The contract in this case provided that Mutual Fire would pay premiums to Petitioner. In return for the premiums, Petitioner would assume a portion of the risks that Mutual Fire bore on its insurance policies. Petitioner would be obligated to pay Mutual Fire for the assumed risks once they became actual liabilities. *Chesapeake*, 933 F.2d at 1209; A-3.

[4] The contract between Petitioner and Mutual Fire was effective on July 1, 1982. The parties renewed it in 1983. The contract eventually covered an underwriting period through June 30, 1985. The forum selection clause in the 1983 renewal was virtually identical to that in the 1982 contract.

Commonwealth Court of Pennsylvania. On October 18, 1989, Petitioner, in violation of the forum selection clause, removed this action to the United States District Court for the Eastern District of Pennsylvania. *Chesapeake*, 933 F.2d at 1210, 1216; A-4, A-19.

Following removal, the parties executed a court-approved stipulation (the "Stipulation") in which Respondent agreed to extend, until November 10, 1989, the time for Petitioner to respond to her Complaint. In exchange, Petitioner agreed that Respondent could have until December 11, 1989, "to file a motion to remand, based on any defect in the removal procedure under 28 U.S.C. § 1447(c)." The Stipulation further provided that "these extensions are without prejudice to the rights of either party and shall not be deemed to constitute a waiver of any rights of either party." *Chesapeake*, 933 F.2d at 1212; A-9, A-28.[5]

On December 11, 1989, Respondent moved to remand the action to the Commonwealth Court of Pennsylvania on the ground that Petitioner, by agreeing to litigate in the forum chosen by Mutual Fire, waived its right to remove.[6] Petitioner opposed

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[5] Petitioner did not inform this Court of the Stipulation in its Petition for Writ of Certiorari. Petitioner's failure to do so constitutes a "misstatement[] of fact . . . which ha[s] a bearing on the question of what issues would properly be before the Court if certiorari were granted." Sup. Ct. R. 15.1. Contrary to its position below, Petitioner now contends that a contractual waiver of removal *is* a procedural defect under Section 1447(c). *See* Petition for Writ of Certiorari at 10-15. Thus, under Petitioner's present characterization of the district court's remand order, the Stipulation properly extended the time for Respondent to file her motion to remand. Moreover, pursuant to the Stipulation, Respondent's motion was timely filed. For this reason, Petitioner's argument about the applicability of the thirty-day limit for filing a remand motion under Section 1447(c), as well as Petitioner's argument about the alleged conflict between the Third and Fifth Circuits on this point, are moot. *See* Argument *infra*, pp. 7-9.

[6] Respondent also moved to remand on abstention grounds. Petitioner opposed remand on this basis. The district court did not address Respondent's abstention argument in light of its ruling on the forum selection clause. A-41.

remand, arguing that the forum selection clause was not a waiver of its right to remove; that the district court lacked authority to remand the action; and that, in any event, Respondent's motion to remand was untimely, despite the Stipulation.[7]

On October 4, 1990, the Honorable Louis H. Pollak of the United States District Court for the Eastern District of Pennsylvania, rejected Petitioner's arguments and remanded the case to the Commonwealth Court of Pennsylvania. Judge Pollak concluded that the forum selection clause was both a waiver of Petitioner's removal right and an appropriate ground for remand. A-40, A-41.

On October [illegible], 1990, Petitioner appealed to the United States Court of Appeals for the Third Circuit.

On May 20, 1991, the Honorable Morton I. Greenberg, writing for a unanimous Third Circuit panel, affirmed Judge Pollak's remand order. The Third Circuit held that the forum selection clause in the parties' contract was a waiver of Petitioner's removal right; that the district court properly enforced the parties' agreement by remanding this action to the forum originally chosen by Respondent; and that Respondent's motion to remand was not untimely.

Petitioner moved to stay the issuance of the Third Circuit's mandate on June 10, 1991. On June 28, 1991, the Third Circuit denied Petitioner's motion and issued its mandate.

On August 15, 1991, Petitioner filed its Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit (the "Petition").

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[7] Petitioner further argued that the forum selection clause was invalid due to Mutual Fire's alleged "fraud, undue influence, or overweening bargaining power." *Chesapeake*, 933 F.2d at 1218-19; A-26. The district court summarily rejected this argument. A-40.

SUMMARY OF THE ARGUMENT

The Petition should be denied for several reasons.

First, under Petitioner's current construction of Section 1447, the district court's remand order is not reviewable. Contrary to its position below, Petitioner now argues that the remand order was based on a "defect in removal procedure" under Section 1447(c). Although Respondent disagrees with Petitioner's new position, under Petitioner's current construction, Section 1447(d) would preclude appellate review of the remand order.

Second, there is no conflict between the circuits regarding the construction of Section 1447(c). The Fifth Circuit has held, as did the Third, that only remand motions grounded in a "procedural defect in removal" are subject to a thirty-day filing limit under Section 1447(c). Neither court has held that a motion to remand, based on contractual waiver of removal, constitutes a procedural defect in removal subject to this time limit.

Third, the Third Circuit's decision that, despite diversity jurisdiction, a district court may remand a removed case in order to enforce a forum selection agreement is consistent with this Court's decisions in *Cohill* and *Thermtron*.

Finally, there is no conflict among the circuits regarding the construction of the forum selection clause. Both the Third and Fifth Circuits have held that the forum selection clause constitutes a waiver of removal, while the Sixth Circuit's decision in *Delta America*, because it applies exclusively to removal by a foreign state under the Foreign Sovereign Immunities Act, is inapposite.

ARGUMENT

I. UNDER PETITIONER'S CURRENT CONSTRUCTION OF SECTION 1447, THE DISTRICT COURT'S REMAND ORDER WOULD NOT BE REVIEWABLE.

Section 1447(d) provides, in relevant part, that:

> An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise. . . .

Section 1447(d) must be construed together with Section 1447(c). *Thermtron*, 423 U.S. at 345. "This means that only remand orders issued under § 1447(c) and invoking grounds specified therein . . . are immune from review." *Thermtron*, 423 U.S. at 346. Section 1447(c) enumerates two grounds for remand: (1) if there is a "defect in removal procedure"; and (2) if it "appears that the district court lacks subject matter jurisdiction."

The parties agreed in the district court that Respondent's remand motion did not invoke a ground specified in Section 1447(c), *i.e.*, it was based neither on a procedural defect in removal nor on a lack of subject matter jurisdiction. A-36. Furthermore, when the Third Circuit questioned whether the remand order was reviewable in light of Section 1447(d), Petitioner reiterated that the remand order was not grounded in Section 1447(c), and thus, was reviewable:

> Here, as noted, Plaintiff's remand motion was based on two grounds *not* provided for by § 1447(c), abstention and the "Service of Suit" clause in the subject reinsurance agreements; the District Court granted the motion based on the latter ground. Clearly, a remand order premised on a forum selection clause is not based on either ground specified by § 1447(c); therefore, it is not immunized from review by § 1447(d).

> Accordingly, since the Remand Order below was not predicated on a ground authorized by § 1447(c), it fully is reviewable by this Court on appeal.

RA-4.

Despite its position before the Third Circuit and the district court, Petitioner now argues that Respondent's remand motion *was grounded in a procedural defect* and, thus, based on a ground enumerated in Section 1447(c):

> The Fifth Circuit reasoned that removal in derogation of a substantive restriction on removal jurisdiction (i.e., a forum selection clause), as well as in violation of a particular removal procedure, each constitutes a defect in 'removal process' and is governed by Section 1447(c).

Petition at 13 (discussing *Baris v. Sulpicio Lines, Inc.*, 932 F.2d 1540 (5th Cir. 1991) and *In re Shell Oil Co.*, 932 F.2d 1518 (5th Cir. 1991)).

Petitioner's construction of Section 1447 is disingenuous. Before the Third Circuit, Petitioner argued that the remand order was not based on a defect in removal procedure under Section 1447(c). This position suited Petitioner's goal - appellate review of the district court's remand order. Now, having lost its appeal, Petitioner has changed its tack. In an effort to create a conflict between the Third and Fifth Circuits, Petitioner now argues that removal in violation of a forum selection clause *does* constitute a defect in removal procedure under § 1447(c).

Such disingenuity should not be countenanced. Petitioner should be estopped from disavowing its prior construction of Section 1447. Under Petitioner's earlier construction, the remand order was not grounded in a defect in removal procedure under Section 1447(c). The Fifth Circuit's opinions in *Baris* and *Shell Oil*, however, are germane only to a remand order grounded in a such a defect. Therefore, under Petitioner's former construction of Section 1447(c), the Fifth Circuit's decisions in *Baris* and *Shell Oil* have no bearing on the issues that were before the Third Circuit.

Alternatively, under Petitioner's new construction, the remand order was based on a ground specified in Section 1447(c), namely, a defect in removal procedure. Under this construction, the fact that Respondent moved for remand on the fifty-fourth day after removal does not take the remand order out of Section 1447(c). Through the Stipulation, Petitioner, with the court's approval, extended the statutory period for Respondent "to file a motion to remand, based on any defect in the removal procedure under 28 U.S.C. 1447(c)." A-28. Thus, under Petitioner's current characterization, the remand order was based on a ground that Petitioner alleges is within Section 1447(c). Accordingly, the Petition should be denied, as the order from which Petitioner appeals would not be reviewable under Section 1447(d).

II. THERE IS NO CONFLICT BETWEEN THE CIRCUITS REGARDING THE CONSTRUCTION OF SECTION 1447(c).

Section 1447(c) provides, in relevant part, that:

> A motion to remand the case on the basis of any defect in removal procedure must be made within thirty days after the filing of the notice of removal under section 1446(a).

Petitioner argues that the Fifth Circuit's construction of the thirty-day filing limit differs from that of the Third Circuit. In *Baris* and *Shell Oil*, the Fifth Circuit held that a remand motion based on a procedurally defective removal must be filed within thirty days of removal. *Baris*, 932 F.2d at 1543-46; *Shell Oil*, 932 F.2d at 1521. The Third Circuit does not disagree with the Fifth. *Chesapeake*, 933 F.2d at 1212-13; A-9-A-13.

Furthermore, the Fifth Circuit's decisions in *Baris* and *Shell Oil* are immaterial under Petitioner's prior construction of Section 1447(c). The Third Circuit had before it a remand motion that Petitioner stated was not based on a defect in removal procedure within the meaning of Section 1447(c). A-29, A-36, RA-1-RA-4. Thus, the Fifth Circuit's opinions, which apply only to a remand motion based on a procedurally defective removal, have no bearing on the issues that were before the Third Circuit.

Despite Petitioner's misapplication of *Baris* and *Shell Oil*, there is no conflict between the Third and Fifth Circuits. Neither *Baris* nor *Shell Oil* involved a remand motion based on contractual waiver. Rather, both cases involved remand motions that the Fifth Circuit defined as grounded in a "procedural defect in removal" based on a statutory prohibition against removal. In *Baris*, the removing party violated an alleged prohibition on removal under admiralty law. 932 F.2d at 1543. In *Shell Oil*, the removing party violated 28 U.S.C. § 1441(b) (1948), which prohibits the removal of cases in which forum defendants are present. 932 F.2d at 1521.

The removal petitions in *Baris* and *Shell Oil* were procedurally defective because of a flaw in the "process" by which the respective cases reached the district court. *See Baris*, 932 F.2d at 1545. If either *Baris* or *Shell Oil* had been filed in a district court in the first instance, they would have been within that district court's original jurisdiction, based on either diversity or federal question jurisdiction. However, once the cases were filed in state court, neither district court had *removal jurisdiction*, *i.e.*, the cases became non-removable. Under these circumstances, the Fifth Circuit considered removal to be a defective "process" for bringing the cases to the federal forum. *See Baris*, 932 F.2d at 1545. Hence, the Fifth Circuit deemed the removal petitions to be procedurally defective under Section 1447(c).

In this action, there was no flaw in the process by which the case reached the district court. Petitioner's removal petition was timely filed, and the district court had removal jurisdiction based on diversity of citizenship and an adequate amount in controversy. *Chesapeake*, 933 F.2d at 1210; A-4. The district court, in order to enforce the parties' agreement, properly adjudicated this case within its removal jurisdiction. In the exercise of this jurisdiction, the district court enforced a substantive contract provision between the parties. As the Third Circuit recognized:

> Indeed, the district court accepted jurisdiction and, in the exercise of that jurisdiction, determined, as a

> threshold matter on the merits, that Chesapeake had waived its right to remove the case - *i.e.* that, pursuant to the parties' contract, the case ought not to have been in federal court.

Chesapeake, 933 F.2d at 1215-16; A-18.

Thus, far from being a defect in the process by which the case reached the federal forum, as in *Baris* and *Shell Oil*, Petitioner's removal created an issue of substantive contract law to be resolved by the district court. In the exercise of its removal jurisdiction, the district court decided the contract issue in favor of Respondent and properly remanded this action to enforce the parties' agreement. Because the Fifth Circuit's opinions are inapplicable to the circumstances of this case, Petitioner's "conflict" is illusory. Accordingly, the Petition should be denied.

III. THE THIRD CIRCUIT'S OPINION IS IN ACCORD WITH THIS COURT'S DECISIONS.

Petitioner argues that the Third Circuit's ruling "clearly conflicts with this Court's decisions in *Cohill* and *Thermtron*, and improperly expands the powers of the district courts beyond those granted by Congress." Petition at 7.

In *Thermtron*, this Court held that a district court "exceeded its authority" in remanding a diversity case on a ground not enumerated in Section 1447(c),[8] namely the crowded condition of the federal docket. *Thermtron*, 423 U.S. at 345.

In *Cohill*, this Court revisited the question whether grounds for remand existed other than those enumerated in Section 1447(c). This Court held that a properly removed case could be remanded on the basis of pendent jurisdiction, a ground not specified in Section 1447(c):

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[8] The amendment to Section 1447(c) was not in effect when either *Thermtron* or *Cohill* were decided. The statute has changed only in that "improvidently" essentially has been recast to mean "procedurally defective," and a filing time limit has been placed on this type of remand motion. 28 U.S.C. § 1447(c) (1948).

> In *Thermtron*, a District Court remanded a properly removed case to state court on the ground that the federal docket was overcrowded. This Court held that the remand was improper. In so doing, the Court stated several times that a district court may not remand a case to a state court on a ground not specified in the removal statute. . . . Petitioners, again noting that the removal statute does not explicitly authorize the remand of cases involving pendent state-law claims, argue that *Thermtron* thus compels a holding that such remands are impermissible.
>
> The language from *Thermtron* that petitioners cite, viewed in isolation, is admittedly far-reaching, but it loses controlling force when read against the circumstances of that case. The *Thermtron* decision was a response to a clearly impermissible remand, of a kind very different from that at issue here.

Cohill, 484 U.S. at 355-56.

Upon review of the quoted *Cohill* language, the Third Circuit held that "*Cohill* clearly overruled *Thermtron* to the extent that *Thermtron* had held that only statutory grounds for remand are authorized." *Chesapeake*, 933 F.2d at 1214; A-15.[9]

Petitioner argues from *Cohill* that diversity jurisdiction is mandatory, and cannot be declined under any circumstances, as if to suggest that the Third Circuit somehow disagreed. The Third Circuit did not:

> Here, of course, removal was based on diversity of citizenship, and the district court did *not* have *discretion* to decline to exercise jurisdiction: its *jurisdiction* was *mandatory*.

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[9] The Second and Seventh Circuits also have stated that *Thermtron* has been overruled by *Cohill* on this point. *Corcoran v. Ardra*, 842 F.2d 31, 36 (2d Cir. 1988)("*Cohill* reveals that permissible bases for remand are not so limited" as set forth in *Thermtron*); *Rothner v. City of Chicago*, 879 F.2d 1402, 1406 (7th Cir. 1989)("the Court in effect held, contrary to *Thermtron*, that § 1447(c) does not contain *all* of the permissible grounds for remand")(emphasis supplied by the court).

Chesapeake, 933 F.2d at 1214; A-14 (emphasis supplied by the court). However, as the Third Circuit also recognized, the district court in the instant case *did exercise its diversity jurisdiction*:

> Unlike the district court in *Thermtron*, the district court here did not refuse to hear a case properly before it. Indeed, the district court in this case accepted jurisdiction and, in the exercise of that jurisdiction, determined, as a threshold matter on the merits, that Chesapeake had waived its right to remove the case - *i.e.* that pursuant to the parties' contract, the case ought not have been in federal court. Thus while the district court did not have discretion, as in *Cohill*, to decline to hear the case at all, once it determined that the clause barred Chesapeake from removing, it would have been committing clear error - and violence to the parties' contract - had it nevertheless continued to hear the case.

Chesapeake, 933 F.2d at 1215-16; A-18.

Several other circuit courts of appeals, as well as numerous federal district courts, have held that a district court is authorized to remand a case based on contractual waiver of removal through a forum selection clause. The vast majority of these cases have been diversity cases.[10]

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[10] In the few instances where the cases do not specifically cite 28 U.S.C. § 1332(a) or otherwise expressly indicate that removal was based on diversity jurisdiction, the facts reveal that the cases are diversity cases. *City of Rose City v. Nutmeg Ins. Co.*, 931 F.2d 13 (5th Cir. 1991)(district court refusal to remand vacated; defendant is a Connecticut corporation and plaintiff is a Texas citizen); *In re Delta America Re Ins. Co.*, 900 F.2d 890 (6th Cir. 1990)(remand order reversed on other grounds but availability of remand on basis of forum selection clause unquestioned); *Regis Assocs. v. Rank Hotels (Management) Ltd.*, 894 F.2d 193 (6th Cir. 1990)(remand order reversed on other grounds but availability of remand order unquestioned; plaintiff is a Michigan limited partnership, defendant is an English corporation); *Karl Koch Erecting Co. v. New York Convention Ctr. Dev. Corp.*, 838 F.2d 656 (2d Cir. 1988)(remand order upheld;

(Footnote continued)

The district court could have dismissed this case on the basis of a forum selection clause, as Petitioner has conceded, in order to enforce the parties' agreement. RA-5-RA-6. In *Cohill*, this Court endorsed a district court's discretionary power to remand, rather than to dismiss, based on the doctrine of pendent jurisdiction. A remand, rather than dismissal, furthered the principles underlying that doctrine, namely "economy, convenience, fairness, and comity." *Cohill*, 484 U.S. at 357. Advancing the principles enunciated in *Cohill*, the Third Circuit upheld the district court's power to remand based on the parties' forum agreement. As in *Cohill*, such a remand promotes economy, convenience, and fairness. *Chesapeake*, 933 F.2d at 1216; A-19. As the Third Circuit held, such principles must be taken into account, or else "a plaintiff proceeding in accordance with the parties' agreement will be penalized for the conduct of a defendant who does not." *Chesapeake*, 933 F.2d at 1216; A-19.[11]

Petitioner cites the dissenting opinion in *Cohill* throughout its argument. The dissenting Justices in *Cohill* were concerned with the plaintiffs' ability to dismiss federal claims as a means of manipulating a case back to state court. Such a tactic would

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diversity case); *Pelleport Investors, Inc. v. Budco Quality Theatres, Inc.*, 741 F.2d 273 (9th Cir. 1984)(remand order upheld; diversity case); *Chestnut Realty of Haverford, Inc. v. First State Ins. Co.*, No. 90-2294, 1990 U.S. DIST. LEXIS 7772 (E.D. Pa. June 19, 1990) (diversity case); *Cessna Aircraft Co. v. Fidelity & Cas. Co. of New York*, 616 F. Supp. 671 (D.N.J. 1985); *Capital Bank & Trust Co. v. Associated Int'l Ins. Co.*, 576 F. Supp. 1522 (M.D. La. 1984)(diversity case); *Himes v. Admiral Ins. Co.*, 575 F. Supp. 312 (E.D. Ky. 1983)(diversity case); *Lavan Petroleum Co. v. Underwriters at Lloyds*, 334 F. Supp. 1069 (S.D.N.Y. 1971); *Perini Corp. v. Orion Ins. Co.*, 331 F. Supp. 453 (E.D. Cal. 1971) (diversity case); *Oil Well Serv. Co. v. Underwriters at Lloyd's London*, 302 F. Supp. 384 (C.D. Cal. 1969); *Euzzino v. London & Edinburgh Ins. Co.*, 228 F. Supp. 431 (N.D. Ill. 1964)(plaintiff is an Illinois citizen; defendant is a British corporation); *General Phoenix Corp. v. Malyon*, 88 F. Supp. 502 (S.D.N.Y. 1949)(plaintiff is a Pennsylvania corporation; defendant is an alien residing in England).

[11] The Third Circuit's rationale for upholding the district court's remand order is consistent with this Court's strong endorsement of the enforceability of forum selection clauses. *See, e.g., Carnival Cruise Lines, Inc. v. Shute*, 111 S. Ct. 1522 (1991); *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972).

"subject the defendant's supposed statutory right of removal to the plaintiff's caprice." *Cohill*, 484 U.S. at 362 (White, J., dissenting). Petitioner fails to recognize, however, that a remand based on a forum selection clause does not implicate this concern. A plaintiff that has chosen its court and legitimately expects to stay in that court pursuant to a forum selection clause cannot be viewed as having any interest in forum manipulation. Unlike the situation posited by the dissenting Justices in *Cohill*, any abuse in the instant case stemmed from Petitioner's ability to manipulate federal court procedure to avoid its contractual obligation.

The Third Circuit's decision is in accord with this Court's decisions. By upholding the district court's power to enforce the forum selection clause through a remand, rather than through a dismissal, the Third Circuit advanced principles commonly espoused by this Court - economy, convenience, fairness, enforcement of legitimate contractual obligations, and the avoidance of forum manipulation. Accordingly, the Petition should be denied.

IV. THERE IS NO CONFLICT AMONG THE CIRCUITS REGARDING THE CONSTRUCTION OF THE FORUM SELECTION CLAUSE.

Petitioner argues that the Third Circuit's decision "squarely conflicts with the ruling of the Sixth Circuit" in *Delta America*. In *Delta America*, the Sixth Circuit reversed a remand order based on the same clause, holding that the clause was not a "clear and unequivocal waiver" of the removal right of a foreign state defendant. 900 F.2d at 894.

Delta America, however, is inapposite. By its facts, *Delta America* applies only to removal by a *foreign state* under the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602-1611 (1976) ("FSIA").[12]

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[12] Petitioner apparently believes that in labelling itself a "foreign defendant" it somehow brings itself within the parameters of the *Delta America* holding. Petition at 16. This legerdemain does not transform Petitioner into a "foreign state" under the FSIA.

The FSIA restricted the immunity of foreign states from federal and state court jurisdiction. *See* 28 U.S.C. § 1605.[13] However, to deter the possibility of local bias and prejudice, the FSIA provides a foreign state with an absolute right of removal, relaxes the time limits for the filing of a removal petition, and guarantees the right to a non-jury trial in federal court. 28 U.S.C. § 1441(d) (1976). The Sixth Circuit reasoned that these removal rights were so important to a foreign state that the court required a high standard by which to ascertain whether a foreign state had waived these rights. *Delta America*, 900 F.2d at 893.

The Sixth Circuit also was interested in developing a uniform body of federal law in light of the judiciary's new responsibility under the FSIA to decide questions of sovereign immunity. "[T]he development of a uniform body of law is served when cases involving foreign sovereigns or their agencies are tried in a federal forum." *Delta America*, 900 F.2d at 894. The concerns underlying the Sixth Circuit's decision, however, are inapplicable because Petitioner is not a foreign state. Likewise, the instant litigation does not implicate any questions of sovereign immunity.

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[13] Section 1603(a) of the FSIA defines "foreign state" as a "political subdivision of a foreign state or an agency or instrumentality of a foreign state." Section 1603(b) defines "agency or instrumentality of a foreign state" as follows:

> (b) . . . any entity—
>
> > (1) which is a separate legal person, corporate or otherwise, and
> >
> > (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and
> >
> > (3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (d) of this title, nor created under the laws of any third country.

The Sixth Circuit expressly restricted its holding that "any claimed waiver of the right of removal stemming from contractual language must be explicit" to "*future cases involving foreign states*." *Delta America*, 900 F.2d at 894 (emphasis added). Accordingly, *Delta America* does not conflict with the Third Circuit's decision in this case. The Sixth Circuit specifically declined to address cases "involv[ing] forum selection clauses, but not foreign states." *Delta America*, 900 F.2d at 894 n.9. In fact, in one of the district court cases cited by the Sixth Circuit in support of its holding that a waiver of removal must be "clear and unequivocal," *Capital Bank*, the district court held that an identical forum selection clause was a waiver of removal by a non-foreign state defendant. *Capital Bank*, 576 F. Supp. at 1524, *cited in Delta America*, 890 F.2d at 892.[14]

The Eighth Circuit opinion cited by Petitioner, *Weltman v. Silna*, 879 F.2d 425 (8th Cir. 1989) adds nothing to Petitioner's argument. The Eighth Circuit, in espousing a "clear and unequivocal" standard for waiver of removal, cites, without analysis, to a treatise. *Weltman*, 879 F.2d at 427.[15] In addition, because

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[14] Subsequent to *Delta America*, the Fifth Circuit held, in accord with the Third, that a remand based on a nearly identical forum selection clause was appropriate. *Nutmeg*, 931 F.2d at 15. As did the Third Circuit, the Fifth Circuit found *Delta America* inapplicable to waiver of removal by a non-foreign state defendant.

[15] The Eighth Circuit cites 1A J. Moore, B. Ringle & J. Wicker, *Moore's Federal Practice* ¶ 0.157[9] (2d ed. 1987). As the Third Circuit pointed out, "Moore makes his statement solely in the context of a discussion of waiver of removal by the defendant's participation in state court proceedings." *Chesapeake*, 933 F.2d at 1218 n.15; A-24 n.15. The Third Circuit goes on to note that a "clear and unequivocal" standard makes sense in this context:

> Otherwise, in order not to waive the right to remove defendants would have to remain inactive in the state court, running the peril of being held in default should a remand from the district court later occur.

However, with respect to contractual waiver:

(Footnote continued)

the Eighth Circuit failed to set forth the clause at issue, *Weltman* cannot serve as a basis for comparison.

In summary, there is no conflict among the circuits regarding the construction of the forum selection clause. The Sixth Circuit's decision in *Delta America* applies only to waiver of removal by a foreign state under the FSIA. It is inapposite to the decisions of the Third and Fifth Circuits, which neither involved a foreign state defendant nor implicated questions of sovereign immunity. Accordingly, the Petition should be denied.

> A court simply should determine contractual waiver of the right to remove using the same benchmarks of construction and, if applicable, interpretation as it employs in resolving all preliminary contractual questions. Indeed, inasmuch as the determination of whether there is a waiver of the right of removal to be derived from a forum selection clause will at least in some cases, such as here, be a matter of construction and thus of law, it seems anamolous to speak of a "clear and unequivocal" standard for we simply make plenary determinations of legal issues.

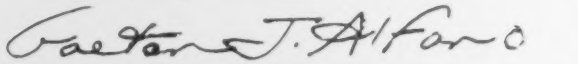
Chesapeake, 933 F.2d at 1218 n. 15; A-24-A-25 n. 15.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that this Court deny Petitioner's Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

Dated: Philadelphia, Pennsylvania
September 16, 1991

Respectfully Submitted,



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APPENDIX

EXCERPT FROM CHESAPEAKE INSURANCE COMPANY, LIMITED'S RESPONSE TO THIRD CIRCUIT DIRECTIVE OF OCTOBER 15, 1990 REGARDING JURISDICTION

I. THIS COURT HAS APPELLATE JURISDICTION TO REVIEW THE REMAND ORDER

A. *The Remand Order Is Appealable*

Settled law provides that the Remand Order is a final order and thus appealable pursuant to 28 U.S.C. § 1291. In *Pacor, Inc. v. Higgins*, 743 F.2d 984 (3d Cir. 1984), this Court was confronted with a district court order remanding to Pennsylvania state court a matter originally removed from state court to bankruptcy court as a "related case" under 28 U.S.C. § 1471(b). This Court held that the remand order was reviewable pursuant to 28 U.S.C. § 1291 as a "final collateral order" under the doctrine of *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 69 S.Ct. 1221 (1949). *Pacor*, 743 F.2d at 987-89.

In holding the district court's remand order appealable in *Pacor*, this Court also relied on *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 103 S.Ct. 927 (1983) ("*Cone*"). *See Pacor*, 743 F.2d at 989-990. In *Cone*, the United States Supreme Court reviewed a district court's order staying a federal action in favor of concurrent state court litigation. With respect to whether there was appellate jurisdiction to review the district court's order, the Supreme Court reasoned that the district court's decision "meant that there would be no further litigation in the federal forum; [and] the state court's judgment on the issue would be res judicata". Consequently, the Supreme Court held that the district court's order "amount[ed] to a dismissal of the suit" and therefore was appealable as a final order. *Cone*, 460 U.S. at 8-10.

In complete accord with *Pacor* is *Pelleport Investors, Inc. v. Budco Quality Theatres, Inc.*, 741 F.2d 273, 276-78 (9th Cir. 1984). In *Pelleport*, the Court of Appeals for the Ninth Circuit held that a remand order based on a contractual forum selection clause — the precise issue raised herein — is "reviewable

as a collaterally final order under [28 U.S.C.] section 1291". *Id.* at 277-78. As in *Pacor*, the Court in *Pelleport* held that a remand order satisfies the criteria of both *Cohen* and *Cone*. *Id.* Furthermore, the Second Circuit has reached the identical conclusion. *Karl Koch Erecting Co. v. New York Convention Center Dev. Corp.*, 838 F.2d 656, 658-59 (2d Cir. 1988) (reviewing by appeal remand order based on forum selection clause). *Cf. Coastal Steel v. Tilghman Wheelabrator Ltd.*, 709 F.2d 190, 195-97 (3d Cir.), *cert. denied*, 460 U.S. 890, 104 S.Ct. 349 (1983) (order *denying* motion to dismiss based on forum selection clause appealable as "collaterally final order under section 1291").[3]

Here, the District Court's Remand Order fits precisely into the *Pacor – Cohen* analysis of appellate jurisdiction: The Remand Order conclusively determined the disputed remand issues (authority to remand, timeliness and the validity and effect of the "Service of Suit" clause); such questions are wholly separate from the merits of the litigation (i.e., how much money, if any, does Chesapeake owe Plaintiff pursuant to the reinsurance agreements); and, if not appealable now, the Remand Order would be unreviewable. *Pacor*, 743 F.2d at 987-989 & n.7; *see also Cone*, 460 U.S. at 10-12; *Pelleport*, 741 F.2d at 278.

Similarly, as with the stay at issue in *Cone*, the Remand Order below means that "there [will] be no further litigation in the federal forum", and thus "amounts to a dismissal since its "purpose and effect" is "to surrender jurisdiction" to the state court. *Cone*, 460 U.S. at 9-10 & n.11; *see also Pacor*, 743 F.2d at 989-90; *Pelleport*, 741 F.2d at 278.

Although, in *Thermtron Prod., Inc. v. Hermansdorfer*, 423 U.S. 336, 351-52, 96 S.Ct. 584, 593 (1976), the Supreme Court noted, without discussion, that its earlier decisions had characterized a remand order as not representing a final judgment reviewable by appeal, this Court, in *Pacor*, declined to follow the *Thermtron* Court's statement and held a remand

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[3] As discussed below, the Court of Appeals in both *Pelleport* and *Karl Koch* also ruled that the bar of 28 U.S.C. § 1447(d) did not apply to a remand order based on a contractual forum selection clause.

order to be appealable. *Pacor*, 743 F.2d at 990 n.9. This Court reasoned that the earlier cases under discussion in *Thermtron* were decided before the *Cohen* collateral order doctrine was developed, and that *Thermtron* itself preceded *Cone*. *Id.*[4]

Accordingly, the Remand Order issued below is appealable as of right pursuant to 28 U.S.C. § 1291.

B. *Chesapeake's Appeal Is Not Precluded by Statute*

In pertinent part, 28 U.S.C. § 1447(d) provides that an "order remanding a case to the State Court from which it was removed is not reviewable on appeal or otherwise". However, this Court's appellate jurisdiction to review the remand order at issue herein is unaffected by this statute.

The Supreme Court and Court of Appeals repeatedly have held that the appellate bar of § 1447(d) strictly is limited to remand orders expressly based on those grounds for remand specified in 28 U.S.C. § 1447(c). *Thermtron*, 423 U.S. at 345-52; *Air-Shields, Inc. v. Hon. John P. Fullam*, 891 F.2d 63, 65-66 (3d Cir. 1989); *Karl Koch*, 838 F. 2d at 658-59; *Pelleport*, 741 F.2d at 276-77; *Levy v. Weissman*, 671 F.2d 766, 769 (3d Cir. 1982); *see Pacor*, 743 F.2d at 991. Accordingly, § 1447(d) is inapplicable to the remand order issued below.

As set forth above, § 1447(c), the statute which governs the remand of cases removed from state court, recognizes two distinct bases for remand – defects in removal procedure, and defects in subject matter jurisdiction. *Supra* note 1. In *Thermtron*, the Supreme Court explained:

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[4] In *Corcoran v. Adra Ins. Co., Ltd.*, 842 F.2d 31, 34-35 (2d Cir. 1988), after much criticism, the Second Circuit abided the Supreme Court's statement in *Thermtron* regarding the finality of a remand order, there based on grounds of abstention. However, in *Ardra* the Court expressly reaffirmed its ruling in *Karl Koch* that a remand order founded on a forum selection clause is properly reviewable pursuant to § 1291 as a collateral final order. *Id.* at 35.

> Section 1447(d) is not dispositive of the reviewability of remand orders in and of itself. That section and § 1447(c) must be construed together. . . . This means that only remand orders issued under § 1447(c) and invoking the grounds specified therein . . . are immune from review.

423 U.S. at 345-46. This Court, in *Fullam*, last year reaffirmed this construction of § 1447(d). 891 F.2d at 65-66. *Accord Karl Koch*, 838 F. 2d at 658-59; *Pelleport*, 741 F.2d at 276-77.[5]

Here, as noted, Plaintiff's remand motion was based on two grounds *not* provided for by § 1447(c), abstention and the "Service of Suit" clause in the subject reinsurance agreements; the District Court granted the motion based on the latter ground. Clearly, a remand order premised on a forum selection clause is not based on either ground specified by § 1447(c); therefore, it is not immunized from review by § 1447(d). *Karl Koch*, 838 F.2d at 658-59; *Pelleport*, 741 F.2d at 276-77.

Accordingly, since the Remand Order below was not predicated on a ground authorized by § 1447(c), it fully is reviewable by this Court on appeal.[6]

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[5] Prior to enactment of the 1988 Judicial Improvements and Access to Justice Act, Pub.L.No. 100-702 (1988), § 1447(c) provided "If at any time before final judgment it appears that the case was removed improvidently and without jurisdiction, the district court shall remand the case, and may order the payment of just costs". The remand order at issue here, however, is governed by the amended statutory provisions. *See Fullam*, 891 F.2d at 65 (1988 amendments to removal and remand provisions effective upon passage).

[6] Further, irrespective of the basis for remand, the Remand Order is reviewable because, as in *Fullam*, 891 F.2d at 66, the District Court "exceeded its statutorily defined power" by remanding this action in violation of § 1447(c)'s mandatory thirty day time limit.

EXCERPT FROM TRANSCRIPT OF ORAL ARGUMENT AND THE COURT'S RULING, THE HONORABLE LOUIS H. POLLAK, U.S.D.J., PRESIDING (OCTOBER 4, 1990)

THE COURT: All right, Mr. Zensky, I think I understand your position as it relates to the interplay between remand and abstention.

Let's take the other prong of the Commissioner's argument, the forum selection clause. Now, I understand that you differ from your friend on how the forum selection clause should be read. We'll pretermit that.

Let's assume, however, that there is a forum selection clause about which none of us can have any argument as to the meaning of — add a few prepositions at the end. The forum selection clause says all the nice stuff that's in this clause and adds, by the way, we, Chesapeake, also mean to waive any privilege of removal to a Federal Court that we might otherwise enjoy in the event that — in the event that Mutual Fire, or its successor, entitled Commissioner Foster — who is soon going to be coming along because Mutual [Fire] handles its business — initiates litigation in the State Court.

So there is this language which none of us are going to argue about. Ms. Foster brings her lawsuit in the State Court. You remove. Ten minutes later, Ms. Foster moves to remand on the ground of the forum selection clause. You say, no, with all respect, Ms. Foster's got it wrong. Forum selection clauses aren't embraced within the grounds of remand that are covered by 1447(c); is that right?

MR. ZENSKY: That's right, Your Honor. I would point certainly to the Thermtron ruling, where the court said that Congress did intend to let the District Courts revise the federal statutes governing removal by remanding cases on grounds that seem justifiable to them, but which are not recognized by the controlling statute.

THE COURT: On the face of that argument, where does Ms. Foster go to enforce her forum selection clause?

MR. ZENSKY: Well, to the extent there was one that is stated, as you put it very clearly, perhaps there would lie a dismissal or summary judgment type motion in that situation to enforce it, but not a remand.

THE COURT: Dismissal for summary judgment? Let me see if I understand.

MR. ZENSKY: Enforce the terms of the clause as the plaintiff saw it.

THE COURT: So Ms. Foster has brought her suit — she's brought her suit and you removed it. She asks for remand, relying on the clause, and you say, no, judge, you have to dismiss her case.

Then what does she do? She sues again in the State Court, and by then you hope the statute has run?

MR. ZENSKY: Or we remove it again.

THE COURT: You remove it again, and again it gets dismissed. And so there becomes no way in which Ms. Foster can proceed with her litigation. That doesn't sound like a likely scenario.

MR. ZENSKY: The plaintiff hasn't asked for a dismissal. The plaintiff asked for remand. Our point is that the statute doesn't recognize this basis for remand.

THE COURT: So you're telling me that this carefully crafted forum selection provision is functus officio?

MR. ZENSKY: For more reasons than one, yes.

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(3)

No. 91-287

In The

Supreme Court of the United States

October Term, 1991

CHESAPEAKE INSURANCE COMPANY LIMITED,

Petitioner,

vs.

CONSTANCE B. FOSTER, Insurance Commissioner of the Commonwealth of Pennsylvania, as Rehabilitator of the Mutual Fire, Marine & Inland Insurance Company,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

REPLY BRIEF

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STATEMENT OF THE CASE

Petitioner Chesapeake Insurance Company Limited ("Petitioner" or "Chesapeake") respectfully submits this Reply Brief in further support of its Petition For Writ of Certiorari ("Pet.") pursuant to Supreme Court Rule 15.6. This Brief is submitted in order to address certain arguments first raised in the Brief in Opposition ("Br.Opp.") of Respondent Constance B. Foster, Insurance Commissioner of the Commonwealth of Pennsylvania, as Rehabilitator of the Mutual Fire Marine & Inland Insurance Company ("Respondent").

Respondent asserts that review of the judgment below is precluded by 28 U.S.C. Section 1447(d) (1991), and that Petitioner somehow has changed its construction of 28 U.S.C. Section 1447(c) (1991) (respectively, "Section 1447(d)" and "Section 1447(c)"). Br.Opp. 7-9. Respondent further asserts that a certain Stipulation and Order entered in the district court ("Stipulation") properly extended the statutory time limit governing Respondent's motion to remand. Br.Opp. 9.

As set forth below, because the district court exceeded its statutory remand authority under *any* characterization of Section 1447(c) and the order at issue, appellate review is not precluded by Section 1447(d). Moreover, Respondent's claims with respect to the record below are incorrect, deceptive and misleading. Finally, the Stipulation, which was not relied on below by either party or the district court (App. 9)[1], in no way deprives

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[1] "App." refers to the Appendix to Chesapeake's Petition For Writ of Certiorari. "Rpl.App." refers to the Appendix to this Reply Brief.

this Court of jurisdiction; nor does it undermine the reasons set forth by Chesapeake in support of its Petition for Writ of Certiorari.

ARGUMENT

I. THERE IS NO BAR TO REVIEW BY THIS COURT

The Court of Appeals below held that Section 1447(c) was inapplicable to Respondent's remand motion, but that the district court nonetheless was authorized to remand this action based on powers extrinsic to Section 1447(c). App. 14-20. In its Petition, Chesapeake argued, *inter alia*, that this was improper. Pet. 6-10. Rather, Chesapeake has asserted that a motion to remand on the basis of a purported forum selection clause properly should be considered as grounded in Section 1447(c)'s grant of remand authority to cases involving procedural defects. Pet. 10-15.

Respondent seeks to invoke Section 1447(d) to bar review. Section 1447(d) provides that, with the exception of cases originally removed pursuant to 28 U.S.C. Section 1443, a remand order "is not reviewable on appeal or otherwise". Respondent maintains that Chesapeake's argument respecting Section 1447(c) renders the matter nonreviewable pursuant to Section 1447(d). Br.Opp. 6-7, 9.[2]

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[2] Simultaneously, Respondent states that it disagrees with Petitioner's argument respecting Section 1447(c) and that review therefore *is* appropriate. Br.Opp. 1-2, 6.

Under the facts and circumstances present in this case, Section 1447(d), for several reasons, has no impact on the availability of review by this Court. *See* Pet. 1.

As acknowledged by Respondent, this Court has held that Section 1447(c) and Section 1447(d) "must be construed together". Br.Opp. 7 (citing *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336, 96 S.Ct. 584 (1976)). Thus, in *Thermtron*, this Court held, *inter alia*, that only those remand orders properly issued pursuant to a district court's statutory authority under Section 1447(c) are immunized by Section 1447(d) from review. 423 U.S. at 343-52. "[W]e are not convinced that Congress ever intended [through Section 1447(d)] to extend carte blanche authority to the district courts to revise the federal statutes governing removal by remanding cases on grounds which seem justifiable to them but which are not recognized by the controlling statute". *Id.* at 351.

Since *Thermtron*, all Courts of Appeals to address the issue have agreed that where an action is remanded for reasons other than those recognized by Section 1447(c), the matter fully is reviewable, notwithstanding Section 1447(d). *E.g., In Re Shell Oil Company*, 932 F.2d 1518, 1518-21 (5th Cir. 1991); *In Re Delta America Re Ins. Co.*, 900 F.2d 890, 892 (6th Cir. 1990); *Karl Koch Erecting Co. v. New York Convention Ctr. Dev. Corp.*, 838 F.2d 656, 658-59 (2d Cir. 1988); *Pelleport Investors, Inc. v. Budco Quality Theatres, Inc.*, 741 F.2d 273, 276-77 (9th Cir. 1984); *Levy v. Weissman*, 671 F.2d 766, 769 (3d Cir. 1982).

Here, both the district court and Third Circuit expressly held that the action should be remanded to state court based on purported district court remand

authority wholly independent of Section 1447(c); indeed, both Courts expressly held Section 1447(c) (and its mandatory thirty day time limit) to be inapplicable. App. 9-20, 29-37. Accordingly, under settled law, the judgment below plainly is reviewable. Given the actual disposition by the Third Circuit, the judgment is reviewable irrespective of Chesapeake's various arguments on appeal.

Moreover, even if this Court was to disagree with the Third Circuit below and hold, as Chesapeake asserts, that Respondent's remand motion *was* encompassed by Section 1447(c), review still would be unaffected by Section 1447(d) because Respondent failed to comply with Section 1447(c)'s mandatory thirty (30) day time limit.

As set forth in Chesapeake's Petition, Section 1447(c) imposes a strict thirty (30) day time limit on remand motions, unless premised on a lack of federal subject matter jurisdiction. Pet. 1-2, 11. Here, however, Respondent concededly first sought remand fifty-four (54) days after removal. Br.Opp. 9; App. 4. Thus, at the close of the thirty (30) day period, the district court's statutory power to entertain Respondent's remand motion terminated, and by remanding the action once the statutory time limit had expired, the district court "exceeded its statutorily defined power". *Thermtron*, 423 U.S. at 351. Under these circumstances, Section 1447(d) cannot act as a bar to appellate review. *Id.* Indeed, the only two appellate decisions to address the reviewability of a remand order issued in derogation of Section 1447(c)'s time limit have both, in accord with *Thermtron*, found the appellate bar of Section 1447(d) to be inapplicable. *Shell Oil*, 932 F.2d at 1520-21 & n. 5 (Section 1447(d) would not preclude review of untimely remand for procedural defects); *Air-*

Shields, Inc. v. Hon. John P. Fullam, 891 F.2d 63, 65-66 (3d Cir. 1989) (vacating untimely remand order as exceeding district court's statutory authority).

Respondent appears to assert that the Stipulation renders the remand order timely and, therefore, non-reviewable. Br.Opp. 4 n.5, 9. Respondent's contention is unavailing since the statutory time limit imposed by Section 1447(c) may not be extended. *See, e.g., Air-Shields*, 891 F.2d at 65-66; *Cf.* Fed.R.Civ.Proc. 6(b) (parties may only extend time limits set by the court, the Federal Rules or a notice issued thereunder).[3] Petitioner believes that an extended discussion of the merits of Respondent's claim is unwarranted at this stage. *See* Supreme Court Rule 14. Suffice it to say, Respondent's assertion in no way deprives this Court of jurisdiction or precludes the availability of a Writ of Certiorari; rather, it simply may add an additional question should this Court choose to review the instant matter, as urged by Petitioner. (It bears noting, however, that, at no point in these proceedings has respondent provided authority for the proposition that Section 1447(c)'s time limit lawfully may be extended.)

Finally, Respondent claims that Petitioner somehow has changed its arguments in this Court from those made before the Third Circuit, and should be "estopped" from

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[3] In both the district court and the Third Circuit, Petitioner argued that the time limit imposed by Section 1447(c) is, in effect, jurisdictional, and thus, not subject to enlargement or waiver. Rpl.App. 5-8 (excerpts from Petitioner's Court of Appeals brief). Since the Third Circuit and district court both held that Section 1447(c)'s time limit was not controlling, neither Court addressed Petitioner's argument that Section 1447(c)'s time limit can not be extended.

arguing that the remand motion at issue was subject to Section 1447(c). Br.Opp. 7-8. Respondent's claim underlies its effort to escape the impact of the recent Fifth Circuit decisions invoked by Chesapeake's Petition, and the resulting conflict with the judgment of the Third Circuit. Pet. 10-15. Respondent brazenly has mischaracterized the record.

Throughout the course of this litigation, Petitioner consistently has maintained that remand of the action to state court was unlawful for *each* of the several reasons set forth in the Petition. Thus, in the district court, the Third Circuit and this Court, Chesapeake asserted that the district court lacked proper authority to even entertain Respondent's motion to remand because the motion *either* was: (1) in violation of the mandatory thirty day time limit set forth in Section 1447(c) *or* (2) outside the scope of remand powers enacted by Section 1447(c) and, therefore, invalid. App. 29-37 (district court opinion; addressing both issues); App. 9-20 (Third Circuit opinion; same); Pet. 6-15. Indeed, while quoting an isolated passage from Petitioner's papers submitted to the Third Circuit, Respondent omits to disclose that Petitioner's *leading* argument on appeal was the same argument respecting Section 1447(c) that Respondent now claims Petitioner somehow should not be permitted to assert. *See* Rpl.App. 1-5. Simply put, there is no merit whatsoever to Respondent's claim that Petitioner should be estopped from raising certain arguments.

CONCLUSION

For the foregoing reasons and those set forth in its Petition, Chesapeake respectfully requests that this Court issue a Writ of Certiorari to the Court of Appeals for the Third Circuit to review the Questions Presented as set forth in the Petition.

Dated: New York, New York
October 2, 1991

Respectfully Submitted

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APPENDIX

* * *

A. The District Court Was Without Authority To Grant a Non-Jurisdictional Remand Motion Made Outside of The Statutory Thirty (30) Day Time Limit

The exclusive procedures governing the remand of a diversity action removed pursuant to 28 U.S.C. §§ 1441(a) and 1446 are set forth in 28 U.S.C. § 1447(c). *Thermtron*, 423 U.S. at 342, 96 S.Ct. at 588-89 (case removed under 28 U.S.C. §§ 1441(a) and 1446 "may be remanded only in accordance with [28 U.S.C.] § 1447 which governs procedure after removal").

Although Plaintiff's motion to remand was not made within the thirty (30) day time limit provided by Section 1447(c), the district court held it had the power to remand this case to the Commonwealth Court of Pennsylvania. In holding that it had such authority, the district court erred.

Section 1447(c) was revised by Congress in 1988.[8] In pertinent part, Section 1447(c) now states:

> Procedure after removal generally
>
> A motion to remand the case on the basis of any defect in removal procedure must be made within thirty days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district

---

[8] The amendments to Section 1447(c) were effective upon passage, i.e., November 19, 1988. *Air-Shields*, 891 F.2d at 65. This action was commenced on or about September 29, 1989.

> court lacks subject matter jurisdiction, the case shall be remanded.

Thus, under Section 1447(c) as in effect when this action was commenced, apart from motions to remand based on an alleged lack of subject matter jurisdiction, there is *no exception* to the thirty (30) day time limit. Since Plaintiff never has alleged any defect in subject matter jurisdiction, the district court had no authority to entertain Plaintiff's motion to remand once the thirty (30) day time limit expired.[9]

Although the thirty (30) day time limit has been in effect for only two years, this Court already has had the opportunity to make clear that compliance with this time limit is mandatory and that contravening remand orders must be vacated. *Air-Shields, Inc. v. Fullam, supra,* 891 F.2d 63.

In *Air-Shields,* the district court remanded the action to state court, *sua sponte,* on the ground that the defendant had failed to file its removal petition within the thirty (30) day time limit set forth in 28 U.S.C. § 1446(b). *Id.* at 64. This Court held that the remand order violated Section 1447(c)'s thirty (30) day time limit, and granted a writ of mandamus to vacate the remand:

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[9] As discussed below, Chesapeake also rejects the proposition that a district court has authority to remand where the basis alleged is a contractual clause. Infra at 19-26. However, assuming such authority does exist, it can derive *only* from Section 1447(c)'s authorization to remand cases involving a "defect in removal procedure"; such authority, therefore, necessarily would be constrained by the applicable statutory thirty (30) day time limit.

> Even if the district court's *sua sponte* action qualifies as a motion under the revised 28 U.S.C. § 1447(c), the district court could only remand within 30 days of the filing of the notice of removal. Here the district court issued its remand order more than seven months after the defendant filed its removal petition. *Revised Section 1447(c) prohibits such untimely remand. . . .*
>
> By remanding the case for procedural defects after the thirty day limit imposed by revised Section 1447(c) had expired, the district court 'exceeded [its] statutorily defined power'.

891 F.2d at 65-66 (emphasis supplied) (footnote & citation omitted). Since this Court determined that the remand exceeded the district court's authority, the correctness of the district court's basis for remand (its finding that removal had been improper) was irrelevant.[10]

As noted, the current Section 1447(c) is the product of a recent revision to the statute by Congress. The district

---

[10] In accord with this Court's *Air-Shields* decision, numerous other courts have denied remand motions made after the expiration of the thirty (30) days, even where such motions, if timely, would have been granted. *E.g., Winners Corporation v. Lafayette Life Insurance Company,* 734 F. Supp. 812, 814-15 (M.D. Tenn. 1989) (removal was defective but § 1447(c)'s time limit "precludes the Court from considering the plaintiff's untimely motion to remand"); *Gray v. Moore's Business Forms, Inc.,* 711 F. Supp. 543 (N.D.Cal. 1989) ("removal was procedurally improper for two reasons" but remand denied; plaintiff "failed to comply with the clear mandate of [§ 1447] subsection (c) that a motion to remand *must* be made within thirty days"); *Taylor v. St. Louis Southwestern Railway Co.,* 128 F.R.D. 118 (D.Kansas 1989) (action removed in violation of § 1441(b) but remand denied).

court's refusal to comply with Section 1447(c)'s time limit was in clear derogation of Congress' intent and purpose in amending the statute.

Prior to 1988, Section 1447(c) contained no time limit for remand motions. Instead, in pertinent part, it stated as follows:

> If at any time before final judgment it appears that the case was removed improvidently and without jurisdiction, the district court shall remand the case, and may order the payment of just costs.

See Levy v. Weissman, 671 F.2d 766, 768 n.7 (3d Cir. 1982).

In 1988, pursuant to the Judicial Improvements and Access to Justice Act, Pub.L. 100-702, 102 Stat. 4642, Congress substantially revised several provisions of the removal and remand statutes (28 U.S.C. §§ 1441-1452), including Section 1447(c). *See generally, Air-Shields*, 891 F.2d at 65.

In imposing the thirty (30) day time limit on non-jurisdictional remand motions, Congress explained its intent and purpose as follows:

> Section 1447(c) now appears to require remand to state court if at any time before final judgment it appears that the removal was improvident. *So long as the defect in removal procedure does not involve a lack of federal subject matter jurisdiction, there is no reason why either State or Federal Courts, or the parties, should be subject to the burdens of shuttling a case between two courts that each have subject matter jurisdiction.* . . . The amendment provides a period of *30 days* within which

> remand *must* be sought on *any ground* other than lack of subject matter jurisdiction.

H.R. 100-889 at 72, 100 Code Cong. & Adm. News at 6033 (emphasis supplied). Thus, Congress clearly has required that *"any"* remand motion which does not allege a lack of subject matter jurisdiction *"must"* be sought within the statutory thirty (30) day period.

Here the district court's authority to order remand only could have been based on Section 1447(c). *Thermtron*, 423 U.S. at 342, 96 S.Ct. at 588-89; *see infra* at 20-26. Because Plaintiff's motion was not premised on any alleged defect in subject matter jurisdiction, it was subject to Section 1447(c)'s mandatory thirty (30) day time limit. In light of Congress' clearly expressed legislative intent in enacting the thirty (30) day time limit and this Court's ruling in *Air-Shields* that a remand order issued in violation of such time limit exceeds "statutorily defined power", the district court below lacked authority to grant Plaintiff's untimely motion. Accordingly, the district court's remand order should be reversed.

* * *

C. There Was No Valid Tolling Of The Thirty (30) Day Time Limit For Plaintiff's Remand Motion

There is no dispute that Plaintiff's remand motion was made well after the expiration of the statutory thirty (30) day time limit. To be sure, Plaintiff did request that Chesapeake stipulate to extend Plaintiff's time to "file a motion to remand, based on any defect in the removal

procedure under 28 U.S.C. § 1447(c)". Chesapeake's counsel executed a stipulation prepared by Plaintiff's counsel, and the district court approved it. App. 302.

This stipulation, however, has *no impact* on the validity of the district court's remand order.

First, in urging that the remand motion was timely filed, Plaintiff's counsel disclaimed any reliance on this stipulation. App. 14 (the stipulation "has no bearing on the motion" before the court). Nor did the district court invoke the stipulation in purporting to find authority to remand this case. App. 81 (Plaintiff "is not relying, and cannot rely, on the stipulation").

Moreover, the statutory thirty (30) day time limit is non-waivable and non-enlargeable. The clear import of Congress' intent in amending Section 1447(c) is that all non-jurisdictional remand motions, in Congress' words "*must*" be made within the thirty (30) day statutory period. Plainly, "must" cannot be read to mean "must unless the parties decide otherwise". Consistently, therewith, this Court's *Air-Shields* decision held that the district courts lack all *power* to remand for non-jurisdictional reasons after the statutory thirty (30) day time limit expires.

Further support is found in the district court's construction of Section 1447(c)'s sister statute, 28 U.S.C. § 1446(b), which imposes a thirty (30) day time limit for effecting removal. This statutory time period has been held absolute and not subject to extension or enlargement, whether by stipulation or court order. *E.g., Capone v. Harris Corp.*, 694 F. Supp. 111, 112 (E.D.Pa. 1988) (thirty day period of § 1446(b) is mandatory and cannot be

extended by the Court"); *Balestrieri v. Bell Asbestos Mines, Ltd.*, 544 F. Supp. 528, 529 (E.D.Pa. 1982) (same); *Tyler v. Prudential Insurance Company*, 524 F. Supp. 1211, 1213 (W.D.Pa. 1981) (thirty day limit of § 1446(b) "cannot be extended by consent of the parties"); *Crompton v. Park Ward Motors, Inc.*, 477 F. Supp. 699, 701 (E.D.Pa. 1979) (same).

The reasoning underlying such strict construction of the removal statute is deference to Congressional intent:

> The overwhelming authority holds that although an untimely petition for removal does not create a jurisdictional defect, the time limit established by the removal statute is mandatory and must be strictly enforced to comply with Congressional intent in fashioning § 1446(b). . . . The removal statute was drafted by Congress, not the federal courts. If Congress had wanted to allow the courts to examine [equitable considerations in support of untimely petitions] it could easily have done so by drafting appropriate legislation.

Village Improvement Ass'n of Doylestown v. Dow Chemical Co., 655 F. Supp. 311, 314-15 (E.D. Pa. 1987).[13] Significantly, when Congress *did* desire an exception to this mandatory thirty (30) day bar, it expressly legislated such exception. *See* 28 U.S.C. 1441(d) ("time limitations of

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[13] The *Dow Chemical* Court also rejected the contention that Rule 6 of the Federal Rules of Civil Procedure provided it authority to extend the thirty (30) day time period since the rule authorizes the enlargement only of those time periods set by the federal rules themselves, notice given thereunder or by an order of court. 655 F. Supp. at 315; *see* Fed. R. Civ. Pro. 6.

§ 1446(b) . . . may be enlarged at any time for cause shown" where action to be removed is against a foreign state). Such legislation would be redundant if Congress understood that litigants or district courts had the power to vary the time limit.

This reasoning is fully applicable here. Congress unambiguously has placed a mandatory time limit on remand motions, subject only to exception for a lack of subject matter jurisdiction. Sections 1446(b) and 1447(c), each with thirty (30) day time limits, should be construed in *pari materia;* thus, the latter, like the former, should be held non-extendable, either by the parties or the court. *See* 2A Sands, *Sutherland Statutory Construction,* § 51.03 (4th Ed. 1984 rev.) at 467-69.